QUESTIONS BY THE PANEL TO THE PARTIES

To the United States

Was the "unforeseen developments" provision of Article XIX:1 of GATT 1994 fulfilled?

Question 1.

> **In *Korea - Dairy Safeguard* and *Argentina - Footwear Safeguard*, the Appellate Body stated that "the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'", Australia, New Zealand and the EC interpret this statement to mean that there must be unforeseen developments that *cause* a surge in imports which *in turn* causes a threat of serious injury, for the "unforeseen developments" requirement of Article XIX to be fulfilled.**
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> **(a) Please comment on this interpretation of the Appellate Body's statement.**

Answer:

1. Through their two-step causation approach, Australia, New Zealand, and the EC have misconstrued both the relevant language of Article XIX and the Appellate Body's findings. The error in this approach is that, contrary to the plain language of Article XIX:1(a), and the Appellate Body's characterization, it de-links the "unforeseen developments" both from the "conditions" under which increased imports are occurring and from the serious injury (or threat) that the increased imports have caused.

2. As a preliminary matter, it is worth noting that, unlike the complainants and the EC, the Appellate Body did not describe the relationship between "unforeseen developments" and increased imports in terms of the former "causing" the latter. That is because Article XIX:1(a) uses the expression "If, as a result of" [emphasis supplied] to describe this relationship, and indeed the relationship between "unforeseen developments" and both "under such conditions" and serious injury (or threat). By distinction, paragraph 1(a) uses the expression "as to cause" in linking "such increased quantities" and "under such conditions" to serious injury.

3. The choice of the expression "If, as a result of" suggests that the framers of Article XIX were seeking to characterize a situation in which a particular outcome ("a result") has followed generally from earlier occurrences. By contrast, the expression "as to cause or threaten", used later in the paragraph, denotes a considerably more direct, cause-effect relationship. The words "If, as a result of" emphasize the end result of "unforeseen developments" (namely, products being imported in such increased quantities and under such conditions as to cause or threaten serious injury) rather than the manner in which those developments produced that outcome.

4. The choice of "If, as a result of" makes plain that, as the Appellate Body concluded in

Korea–Dairy (at ¶ 85), "unforeseen developments" do not constitute an additional condition for the application of a safeguard measure. Rather, its focus on result rather than causation suggests that the "unforeseen developments" language is meant to characterize the unexpected ("unforeseen") nature of injurious import surges of the type described in Article XIX:1(a). Seen in this light, "unforeseen developments" are simply a restatement of the "emergency" character of those situations that Article XIX is designed to address.

5. Thus, the complainants' specific suggestion that Article XIX:1(a) imposes a simple, two step causation requirement is wrong because it fails to differentiate between "If, as a result of" and the causation language used elsewhere in that article.[1] It is also wrong because the "result" of unforeseen developments can be either an increase in imports or a change in economic, financial, or other "conditions" that apply to such imports, or both. The text of Article XIX:(1) makes clear that both increased imports and such "conditions" can result from "unforeseen developments," not merely the former.

6. Indeed, as the phrasing of Article XIX:1(a) suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury. For example, where conditions of competition have unexpectedly changed, an increase in imports that would not otherwise have been injurious may cause serious injury.

7. Moreover, as the Appellate Body recognized in the quotation that the Panel cites, "unforeseen developments" of the kind described in Article XIX:1(a) do not merely lead to increased imports or changes in the conditions under which they are imported. Rather the result of the "unforeseen developments" is those specific types of import increases ("in such quantities") and circumstances ("under such conditions") that cause or threaten serious injury. Thus, the result of unforeseen developments is the entire set of consequences addressed by Article XIX:1(a): to wit, an increase in imports that is "recent enough, sudden enough, sharp enough, and significant enough" as to cause or threaten serious injury to a domestic industry.[2]

8. Because this is the case, it would be highly unlikely that a Member would ever have "foreseen" developments of the sort mentioned in Article XIX:1(a) at the time it makes a tariff

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[1] As the Appellate Body concluded in *Hormones*, "the implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement." *European Communities -- Measures Concerning Meat and Meat Products*, WT/DS26 and 48/AB/R, Report of the Appellate Body, 13 February 1998, at ¶ 164, *citing United States--Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body, 25 February 1997, at 17.

[2] *Argentina–Footwear*, Report of the Appellate Body at ¶ 131.

concession. The structure of GATT tariff concessions (incremental reductions phased in over time), the fact that Members bargain for and schedule tariff concessions on a product-by-product basis, and the intermittent nature of tariff negotiating rounds together create an environment in which governments can grant tariff concessions in a manner that avoids knowingly imperiling their domestic industries. Because Members cannot be presumed intentionally to place their industries in jeopardy through the grant of tariff concessions, it must be presumed that later developments which imperil their producers are of a kind that were "unforeseen" when the concessions were negotiated.

(b) In the light of the Appellate Body's statement, how does the United States substantiate its argument that a major "unforeseen development" was increased import volume combined with a shift in the product mix of imports away from frozen lamb meat and toward fresh/chilled lamb meat?

Answer:

9. The facts in this case are similar to those found by the Working Party in *Hatters' Fur* to constitute unforeseen developments.[3] Here, as in *Hatters' Fur*, an unforeseen development both results in increased imports *and* contributes to conditions in which the quantity and effects of the increased imports so affect the domestic industry as to cause or threaten to cause serious injury. In fact, the USITC found that both increased imports and a deterioration in the condition of the domestic industry occurred as a result of the shift in the product mix of imports from frozen to fresh or chilled lamb meat.

Increased imports

10. The change in the product mix of imported lamb meat resulted in a surge of low-priced lamb meat into the United States after 1995. The surge was not foreseen at the time the tariff concession on lamb meat was negotiated as part of the Uruguay Round. Lamb meat imports increased by 19 percent in 1997 from the same period a year earlier, and imports increased by 19 percent in the first nine months of 1998. Most of the increase in imports between 1995 and 1997 was in fresh or chilled lamb meat, which increased by 101 percent during that period, as compared to 11 percent for imports of frozen lamb meat.[4]

Conditions based on quantity and effects of imports

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[3] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951.

[4] USITC Report at I-22.

11. The shift in the product mix of imports away from frozen lamb meat and toward fresh and chilled lamb meat deeply affected conditions in the U.S. market. This was true both in terms of increased quantities of imported lamb meat flooding the U.S. market in 1997 and interim 1998, and in their effects. A primary effect of the change in the product mix of imports was an increasing convergence in the U.S. market of domestic and imported product. Consumers were no longer limited to purchasing fresh or chilled lamb meat only from domestic sources but could purchase competing, lower-priced imports sold in a form (fresh or chilled) and cut similar to that produced by the domestic industry. Since 1996, the majority of lamb meat imports from Australia has been fresh or chilled,[5] and an increasing share of imports from New Zealand were fresh or chilled.[6]

12. The changing conditions of competition in the domestic lamb market during the latter stages of the period of investigation required U.S. producers to adjust to a market with increased competition from imported fresh and chilled lamb meat.[7] Competing imports displaced U.S. product, which resulted in a higher market share for importers of lamb meat.[8] Complainants' submissions before the Panel, and their nationals' submissions before the USITC, evidenced that imports displaced domestic lamb meat. Australia has conceded that about one third of the increase in lamb meat imports over the period of investigation displaced domestic lamb meat.[9] During the USITC investigation, both Australian and New Zealand respondents made a similar concession.[10]

13. Neither the change in the product mix of imports nor the degree to which this change would affect market conditions for U.S. producers of lamb meat could have been foreseen in 1993 by U.S. negotiators of the tariff concession on lamb meat. The change in the product mix of imports, in this particular case, both resulted in increased imports and contributed to conditions in the U.S. market whereby the quantity and effects of the increased imports threatened to cause serious injury to the domestic industry.

(c) Please explain your apparent view that no *finding* of "unforeseen developments" is necessary for this provision of Article XIX:1 of GATT 1994 to be fulfilled. If no such finding

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[5] USITC Report at II-16.

[6] USITC Report at II-43.

[7] USITC Report at I-32.

[8] USITC Report at I-31and I-32.

[9] Australia's First Written Submission at ¶ 146.

[10] USITC Hearing Transcript at 164, attached hereto as U.S. Exhibit 20.

is necessary, how can compliance with this provision be reviewed by a panel?

Answer:

14. The Appellate Body's decisions in *Korea–Dairy* and *Argentina–Footwear* establish that "unforeseen developments" do not constitute an "independent condition" for the application of a safeguard measure. This conclusion is in keeping with the specific language of Article XIX:1(a) as discussed above. It is also consistent with the fact that nothing in Article 3 of the Safeguards Agreement, which establishes procedures for investigations by the competent authorities, or Articles 2 and 4, spelling out the subject matter of such investigations, requires the establishment of such a condition. Nor do any of these provisions furnish a standard on which the competent authorities could decide on the degree, type, source, and specificity of evidence necessary to determine whether a government's negotiators (or the government as a whole) "foresaw" later developments. This fact again suggests that the competent authorities are not required to find the existence of "unforeseen developments" in the course of their investigation.[11]

15. This silence reflects the understanding embodied both in Article XIX and arising from the structure and procedures applicable to GATT tariff concessions, as discussed above, that Members should not ordinarily be presumed to intend their tariff concessions to result in serious injury to their domestic industries. This conclusion is consistent with the historical context in which Article XIX was developed.

16. Paragraph 1(a) of Article XIX was inserted in the GATT 1947 at U.S. insistence. It was derived virtually verbatim from so-called "escape clause" provisions included in contemporaneous U.S. trade agreements, specifically the U.S. reciprocal trade agreement with Mexico, negotiated in 1942.[12]

17. The United States' insistence on such provisions, both in bilateral agreements and in the GATT, reflects the restraints that had been placed on the President's ability to negotiate tariff

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[11] If competent authorities were required to make findings with regard to "unforeseen developments", they would need to undertake two additional inquiries, one directed at identifying those developments and their impact and a second regarding whether they were "foreseen." The first investigation would take a considerable time, perhaps as long as the authorities' injury and causation investigation itself, since much of the evidence to be collected would be related to and derived from evidence in the injury investigation. The second investigation could not begin until the first had been completed, thus substantially delaying issuance of the authorities' final report. The second inquiry would entail an entirely new additional investigation, based on interviews of and the results of questionnaires addressed to current and former government and industry officials, plus an examination of pertinent negotiating, other governmental, and industry records. Moreover, it is not clear that competent authorities (which normally perform economic analyses) would have the expertise, or legal authority, to perform such a task.

[12] 57 Stat. 833 (1943), E.A.S. 311 (effective January 30, 1943), attached hereto as U.S. Exhibit 21.

concessions. At the time, the President was negotiating trade agreements under a limited grant of tariff authority from the Congress provided in the Reciprocal Trade Agreements Act of 1934 (an amendment to the Smoot-Hawley Tariff Act of 1930).[13] To reassure domestic industries, the President was constrained under the 1934 Act in the depth of tariff cuts he could commit the United States to undertake. As a result, U.S. tariff concessions in any particular negotiation – including the original GATT negotiations – were necessarily limited in nature.

18. Moreover, under the terms of an Executive Order issued in February 1947 (between the GATT preparatory sessions),[14] before negotiating any trade agreement the President was required to seek written, public advice from the USITC (then the U.S. Tariff Commission) on the probable economic effect of tariff reductions on all product categories the President proposed for inclusion in the negotiations.[15] That is, the Commission was to publish its views on the effect that tariff reduction would have on each product.

19. The net effect of the tariff limitation and public advice provisions included in the 1934 act and the subsequent executive order was to place the President under legal and political restraints designed to preclude the negotiation of drastic tariff reductions of a nature that might be expected to result in a flood of imports and serious injury, or threat of injury, to any domestic industry. By contrast, the President was authorized to agree to smaller duty reductions negotiated on a product-by-product basis to avoid imperiling U.S. producers. This incremental approach to tariff reduction was reflected in the relatively modest, phased-in duty reductions provided for under the original GATT tariff concessions, and was enshrined in GATT Article XXVIII *bis*, which calls for periodic rounds of tariff negotiations with a view to progressive duty reductions over time.

20. Given this gradualist approach, while tariff concessions might be expected to lead to modest import growth in particular sectors, the concessions would not normally be expected to unleash a flood of imports with consequent serious injury, or threat of serious injury, to domestic industries. Nonetheless, U.S. negotiators recognized that even with limited tariff concessions, it was impossible to rule out the possibility – especially given the economic dislocations and uncertainty provoked by World War II – that future, unforeseen changes in market, financial, or economic conditions might lead to a surge in imports. That concern created the need for an "escape clause," which would be available to allow "emergency action" to address such situations. The escape clause provided reassurance for concerned domestic constituencies and, in turn, enabled the United States (and other governments) to make tariff concessions that might otherwise have been politically impossible.

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[13] Attached hereto as U.S. Exhibit 22.

[14] *See* John Jackson, *World Trade and the Law of GATT* 553 (1969), attached hereto as U.S. Exhibit 23.

[15] *See* Exec. Order No. 9832 of February 25, 1947, ¶¶ 5-8, attached hereto as U.S. Exhibit 24.

21. Viewed in this light, the "unforeseen developments" referenced in Article XIX are any later occurrences that upset a Member's expectation that its tariff concession will not result in serious injury or threat of serious injury for its domestic industry. As the chairman of the Tariff Commission remarked in a report submitted to the Senate Finance Committee in June 1948 on the Commission's procedures for implementing the "escape clause" (then embodied both in an Executive Order and in GATT Article XIX:1(a)):

> The construction which the Commission places on the words 'unforeseen developments,' as concerns the exercise of its functions under the escape clause, is that when imports of any commodity enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers, this situation must, in the light of the objective of the trade agreements program and of the escape clause itself, be regarded as the result of unforeseen developments.[16]

22. Thus, the Tariff Commission made clear as early as 1948 – like the Appellate Body more than 50 years later – that the reference to "unforeseen developments" does not create an independent condition for application of the escape clause. Rather, the language is a restatement of the circumstances in which recourse to the escape clause itself is permitted – namely, a situation in which, following implementation of a negotiated tariff reduction, a surge in imports and serious injury (or threat) to a domestic industry has unexpectedly occurred.

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[16] *Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate*, H.R. 6556, at 128 (1948), attached hereto as U.S. Exhibit 25. Three members of the Commission repeated this view in a 1953 report of an escape clause investigation conducted on imports of hand-blown glassware. Despite the fact that these Commissioners found that increased imports had not caused serious injury, they observed that:

> In granting trade agreement concessions, the United States fully contemplates that imports will increase. It does not, however, intentionally grant concessions of such breadth and depth as to cause (or threaten) serious injury to a domestic industry. The major purpose of the escape clause legislation is to provide a remedy whenever experience under a trade agreement concession indicates that an error was committed and that imports have in fact increased, either absolutely or relatively to domestic production, to such an extent as to cause or threaten serious injury to a domestic industry.

United States Tariff Commission, *Hand-Blown Glassware*, Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953), attached hereto as U.S. Exhibit 26.

23. The 1951 Working Party report on *Hatters' Fur* provides further support for this conclusion. The members of the Working Party (with the exception of the United States) considered that "unforeseen developments" should be understood to be "developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated."[17]

24. As the Working Party report notes, U.S. negotiators in Geneva had been aware in 1947 that hat styles were subject to change and they had expected some increase in imports following implementation of the tariff concession. The members of the Working Party (except the United States) considered that U.S. negotiators should have foreseen that hat fashion styles would, in fact, change. But the Working Party (except Czechoslovakia) found that U.S. negotiators could not have foreseen the specific change in style that actually occurred, the large scale of that change, or its prolonged duration.[18]

25. Taken as a whole, the Working Party report suggests that future developments (*e.g.*, later changes in hat styles) can be understood to have been "foreseen" at the time the tariff concession was made if they are a direct result of economic factors of which the tariff negotiators had actual knowledge at the time (hat fashions are subject to change). But the report also suggests that specific developments in the marketplace of the type leading to an injurious import surge (a major, sustained shift to a new hat style) cannot be understood to have been "foreseen." Thus, the Working Party report confirms the conclusion that specific changes in the marketplace that result in an injurious import surge cannot normally be considered to have been "foreseen."

26. Since Members can normally be assumed to structure their tariff concessions in a way to avoid unleashing an injurious import surge, a surge of that nature must presumptively be regarded as the result of unforeseen developments. The developments themselves will typically be apparent in the competent authority's report of its investigation, as is the case in the USITC report of its lamb meat investigation. Their unforeseen character will be implicit in the result they have produced.

27. There may be rare instances in which a Member has specifically contemplated that a tariff concession it has made would result in sudden and severe injury, or threat of injury, to a domestic industry. In such a case, parties appearing before the competent authority in its injury investigation would be free, under Article 3.1 of the Safeguards Agreement, to present evidence to this effect and argue that the application of safeguard measures would not be "in the public interest." Should such measures be applied nonetheless, a complaining Party in panel proceeding

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[17] *Hatters' Fur* at ¶ 9.

[18] *Hatters' Fur* at ¶ 11.

brought under the DSU would equally be free to point to this evidence and argue that the normal presumption of "unforeseen developments" should not apply.

Is the definition of the "domestic industry" that was used in the USITC's investigation consistent with the Safeguards Agreement and GATT 1994?

Question 2.

> **The United States takes the view that - where there is a "continuous line of production from the raw to the processed product" and "substantial coincidence of economic interest" - producers of input products form part of the "domestic industry" producing the processed product. Can the United States explain, in the hypothetical situation where the end-product is composed of and processed from a large number of inputs which are functionally dedicated to the production of only that end-product, under which conditions or circumstances input producers would be *excluded* from the domestic industry definition even if there is a continuous line of production and economic interests happen to substantially coincide? Or is it the United States' view that such input producers would in all cases be a part of the domestic industry?**

Answer:

28. The panel's hypothetical has not arisen before the USITC and will not because of the nature of the USITC's test. Cases in which the USITC considers whether to include producers of the raw product (*e.g.*, growers) and processors in the same domestic industry solely involve processed agricultural products.[19] In those investigations, the USITC examines whether the evidence establishes a continuous line of production from the raw product to the processed product. As reflected in the term "raw," the product moves along the continuum from unfinished to finished form. Multiple inputs are not contemplated in such a situation because the test is reserved for moving a primary product from being raw to "market-ready." The U.S. test does not, as the *Manufacturing Beef* panel characterizes the Canadian test at issue there, simply provide for relief to be available to input suppliers in general when they suffer injury from imports equivalent to that normally suffered by those who produce end-products.

29. Likewise, the hypothetical the panel poses would not arise because of the second prong of the USITC's test. The hypothetical assumes there would be a "substantial coincidence of

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[19] *See Fresh Tomatoes and Bell Peppers*, Inv. No. TA-201-66,USITC Pub. 2985 (Aug. 1996), at I-9-10, attached hereto as U.S. Exhibit 27; *Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10, attached hereto as U.S. Exhibit 28; *Certain Canned Tuna Fish*, Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7, attached hereto as U.S. Exhibit 29.

economic interest" between the producers of multiple inputs and the processors of the finished product. However, it is difficult to conceive of a processed product comprised of a mix of raw agricultural products, each of which would be dedicated to only one end-product. It is also unlikely there would ever be a coincidence of economic interests between such multiple input producers and the processors of the final product. Such a situation is only liable to occur where, as here, the processing stage reflects minor value-added components contributing to essentially a finishing operation.

Question 3.

We note that Article 4.1(c) focuses on the "output" of the "like or directly competitive products" (i.e., "firms whose collective *output of the like or directly competitive products* constitutes a major proportion of the total domestic production of those products"). How would the United States reconcile its definition of the domestic industry with this provision?

Answer:

30. The United States' definition of the domestic lamb meat industry is consistent with Article 4.1(c) of the Safeguards Agreement. The USITC defined the domestic industry producing lamb meat to include growers and feeders of live lambs as well as packers and breakers of lamb meat.[20] The ordinary meaning of the term "product" is defined as the "output" of an industry or firm,[21] and the ordinary meaning of the word "production" is defined as the "total output especially of a commodity or an industry."[22] Consistent with these definitions, lamb meat is produced by the domestic industry through an extended and continuous line of production yielding the output of a commodity, "lamb meat." The plain meaning of the term "output" refers to "something produced" in "agricultural or industrial production."[23] U.S. growers and feeders of live lambs as well as packers and breakers of lamb meat all produce an "output" that is an agricultural product.

Question 4.

In this context, please discuss the *Canada - Manufacturing Beef* dispute (SCM/85),

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[20] USITC Report at I-13.

[21] *Webster's Third New International Dictionary (Unabridged)* at 1810 (1981), attached hereto as U.S. Exhibit 30.

[22] *Webster's New Collegiate Dictionary* at 918 (1977), attached hereto as U.S. Exhibit 31.

[23] *Webster's Ninth New Collegiate Dictionary* at 838 (1985), attached hereto as U.S. Exhibit 32.

in which the panel rejected Canada's reasoning (which was very similar to the USITC's reasoning in this case) for considering the producers of live cattle to be among the producers of manufacturing beef. Why would that panel's reasoning not be equally persuasive and relevant in this case?

Answer:

31. It is important to note at the outset that *Manufacturing Beef* was an unadopted decision. In *Japan–Taxes on Alcoholic Beverages*, the Appellate Body discussed the legal status of panel reports, and in particular unadopted panel reports. *Adopted* panel reports:

> are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[24]

32. *Unadopted* panel reports, by contrast, "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members."[25] The Appellate Body's conclusion is especially pertinent in this case, because the WTO membership could have "endorsed" the *Manufacturing Beef* decision by codifying it in the new WTO Subsidies Agreement. Their failure to do so should counsel against extending that decision's reasoning to cases under the Subsidies Agreement, much less the Safeguards Agreement.

33. In any event, even if the panel's decision in *Manufacturing Beef* were applicable in a countervailing duty case, it is not relevant to this case. The panel's determination that cattle producers were not "producers" of manufacturing beef was based in large part upon its interpretation of Article 6.6 of the Subsidies Code, which stated that:

> The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports

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[24] *Japan–Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, at 14.

[25] *Id.* at 14-15.

> shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.[26]

34. In the view of the Panel, Article 6.6:

> indicates a preference for narrowing the analysis of injury to those production resources directly engaged in making the like product itself. Applied to a vertical production process involving several stages, this principle would indicate that the analysis should likewise be focused on the stage of production devoted to actually making the like product in question, as opposed to earlier stages devoted to producing inputs.[27]

35. The Panel also cited Article 6.6 in distinguishing the panel's decision in *New Zealand – Transformers* (unlike *Manufacturing Beef*, an adopted decision), which, as the United States explained in its First Written Submission (at ¶ 71), supports the USITC's determination of the domestic industry in this case.

36. The Safeguards Agreement contains no provision equivalent to Article 6.6. Therefore, the Panel's analysis, which was based on that provision, is inapposite.[28]

37. As discussed in the United States' First Written Submission, the USITC's approach in this case is supported by the express purposes of the Safeguards Agreement and its remedial provisions, which are not comparable to provisions of the Tokyo Round Codes. The resolution of the question at hand should be decided on the basis of the text of the Safeguards Agreement, the particular Agreement at issue, and not by reference to an unadopted decision of a GATT panel interpreting another Agreement and, in particular, a provision of that Agreement that does not appear in the Safeguards Agreement.

38. In addition, this case is distinguished from *Manufacturing Beef* not only by its legal posture, but also by its facts. In *Manufacturing Beef*, the Panel found boneless manufacturing beef to be a "by-product" resulting from economic activities whose principal aim was to produce

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[26] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Art. 6.6.

[27] *Manufacturing Beef* at ¶ 5.3.

[28] In the view of the United States, the Panel's interpretation of Article 6.6 (and thus its conclusion in *Manufacturing Beef*) was erroneous. Therefore, even if the Safeguards Agreement did include such a provision, it would not change the fact that the USITC's approach to this issue was correct.

other products for sale.[29] The EEC had argued that "viewing the entire economic process by which inputs were produced for transformation into boneless manufacturing beef, it could not be said to involve either continuous production or functional dedication."[30] In contrast, and as confirmed by the USITC, the production of lamb meat involves both continuous production and functional dedication of the live lamb to lamb meat. The USITC found that, in the United States, most sheep and lambs are meat-type animals kept primarily for the production of lambs for meat.[31] Except for lambs withheld for breeding purposes, virtually all meat-type lambs are shipped to feeders in the fall[32] and are then generally shipped to packers for slaughter.[33] Packers then either further process the lamb or ship the carcasses to breakers who perform a similar processing function.[34] The cuts are then sold to wholesalers or retail outlets. Obviously, this is not a case where production of the like product results "from economic activities whose principal aim is to produce other products for sale" as was claimed in *Manufacturing Beef.*

39. To the extent *Manufacturing Beef* is at all relevant, it is because one of the complainants in this case – Australia – took a position in *Manufacturing Beef* that was contrary to the position it takes here. In *Manufacturing Beef*, Australia argued it was the growers who produced the beef; the abattoirs were merely finishers who placed the product in a usable form.[35] Australia adopted the same reasoning as the USITC in its lamb meat investigation and agreed that the CCA should include cattle growers in the domestic industry producing beef. As Australia there argued, when the processor is simply making a product "market-ready," a grower is properly regarded as a producer of the finished good. Australia's position in that case is inconsistent with any conclusion that the ordinary meaning of the term "producer" can resolve the question at issue here contrary to the United States' position. Further, if Australia believed in *Manufacturing Beef* that cattle growers supplying less than 50 percent of a product's meat input constituted producers of the finished product, then it certainly must also believe that lamb growers supplying 100 percent of the product's meat input are producers of the product.

40. As Australia argued in *Manufacturing Beef*, [36] such an approach is in keeping with Ad Article XVI of the *GATT 1994*, Section B, paragraph 2, which defines a primary product as "Any

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[29] *Manufacturing Beef* at ¶ 5.12.

[30] *Manufacturing Beef* at ¶3.23.

[31] USITC Report at I-13 and II-4.

[32] USITC Report at I-13 and II-11, II.

[33] USITC Report at I-13 and II-14.

[34] USITC Report at I-13 and II-14-15.

[35] *Manufacturing Beef* at ¶ 4.1.

[36] *Manufacturing Beef* at ¶ 4.1.

product of farm . . . in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." Although the *Manufacturing Beef* panel declined to rely on the Ad Article because it and the Tokyo Round Agreement had different purposes, the Ad Article definition provides further evidence that, in normal trade parlance, the production of primary products involves both raw and processed forms.

Question 5.

> **Please comment on New Zealand's argument at para. 29 of its oral statement that the term "as a whole" in Article 4.1(c) has to do with the representativeness of the data used in an investigation in respect of the entire industry, and not with the scope or breadth of the domestic industry itself.**

Answer:

41. The term "as a whole" is not defined by the Safeguards Agreement. While the United States supports New Zealand's view that the purpose of the term may be to ensure that a safeguard investigation is not limited to selected individual members of an industry, it rejects the claim that "as a whole" is a qualifying term meant to define the scope of the producers *within* an industry. Contrary to New Zealand's additional assertion, the United States has not used the term "as a whole" to expand the membership of an industry beyond those who produce the "like or directly competitive product."

Did the USITC demonstrate that the domestic industry faced a "threat of serious injury" due to "increased imports"?

Question 6.

> **In its investigation, how did the USITC determine that the threatened injury was "serious" as opposed to some lesser degree of injury? Where in its determination can this be found?**

Answer:

42. As a preliminary matter, it would appear that the question of whether Article 3.1 of the Safeguards Agreement required the USITC to state in its report why the threatened injury was "serious" as opposed to meeting some lesser standard, does not appear to be at issue in this dispute and would be outside the Panel's terms of reference. Article 3.1 is the only provision obligating a Member to publish conclusions reached on pertinent issues. The complainants did not identify this issue in their panel request, nor did they raise it in their first written submissions.

Those submissions rely on Article 3 only in challenging the United States' choice of a safeguard measure, not in challenging the USITC's threat of serious injury determination, for which they rely on Article 4. Consequently, any claim that under Article 3.1 the USITC should have articulated an additional legal conclusion is outside the terms of reference of this dispute. However, the United States is pleased to respond to the Panel's question.

43. The USITC justified its conclusion that the industry was threatened with injury that was serious through its findings at pages I-16 through I-21. That discussion affirmatively explains why the USITC regarded "the deterioration in [economic] indicators . . . after 1996"[37] as confirming that the industry was threatened with serious injury. The USITC explicitly recognized that the requisite standard for its injury determination was whether there had been "a serious . . . overall impairment in the position of [the] domestic industry",[38] which is the definition of serious injury under Article 4.1(b) of the Safeguards Agreement. The authority's conclusion emphasized the declines in the domestic industry's "market share, production, shipments, profitability, and prices, among other difficulties that the domestic industry [was] facing."[39] The findings on those factors demonstrate why the USITC regarded the industry on the verge of a significant overall impairment of its position.

44. The Agreement does not require more. The WTO Agreements as a whole do not articulate a precise relationship between the "serious injury" standard set forth in the Safeguards Agreement and other standards set forth in other agreements, such as the "material injury" standard used in the Antidumping Agreement. Although the Safeguards Agreement defines the term "serious injury", neither the Antidumping Agreement nor Article VI of the GATT 1994 defines "material injury." Consequently, the WTO Agreements do not provide the basis for a precise comparison between different "degrees" of injury, nor do any of the Agreements call for a comparison.

Question 7.

> **Under the causation standard applied by the United States in this case, can it be determined that imports of lamb meat in isolation were causing or threatening to cause a degree of injury that is "serious", regardless of the possible additional injury that might be caused by other factors? If so, how? Is such a determination necessary? Please explain.**

Answer:

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[37] USITC Report at I-18.

[38] USITC Report at I-16, *quoting* Section 202(c) of the Trade Act of 1930.

[39] USITC Report at I-21.

45. Underlying New Zealand's assertion that the Safeguards Agreement required the USITC to "isolate" the effects of increased imports is the apparent assumption that the Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury. Both the purported "isolation" requirement and the premise on which it is based are unfounded.

Sole Cause

46. Articles 2.1 and 4.2 of the Safeguards Agreement, which respectively set out the conditions for the application of safeguard measures and requirements for determinations of serious injury or threat thereof, both employ the verb "to cause" in one form or another. *Webster's Third New International Dictionary (Unabridged)* at 356 (1981) defines the verb 'cause' as follows: "to serve as cause or occasion of." Webster's makes clear that 'cause' (in noun form) need not be the sole determinant of an outcome:

> CAUSE indicates a condition or circumstance or combination of conditions and circumstances that effectively and inevitably calls forth an issue, effect or result *or that materially aids in that calling forth.* (emphasis added.)[40]

As the preceding definition indicates, while a cause need not be the sole determinant of a result, it must nevertheless be important. That is, it must *materially* aid in generating the result.[41] Webster's defines the term 'material' as follows: "being of real importance or great consequence: SUBSTANTIAL."

47. New Zealand has objected to the fact that the USITC applied a "substantial cause" analysis in determining whether increased imports threatened serious injury to the U.S. lamb industry. But, as demonstrated above, the expression "substantial cause" (defined under U.S. law as "a cause which is important and not less than any other cause") fully accords with the ordinary meaning of "to cause" as used in the Safeguards Agreement.

48. The fact that the Safeguards Agreement treats "cause" in accordance with its ordinary meaning, rather than as "sole cause," finds support in Article 4.2(b). That provision requires a competent authority to demonstrate "the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof." The term 'causal' has the meaning

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[40] *Webster's Third New International Dictionary (Unabridged)* at 356 (1981), attached as U.S. Exhibit 33.

[41] While the relevant *New Shorter Oxford English Dictionary* ("NSOED")definitions support the concept of multiple causes, *see* NSOED at 355 (defining "cause" as "That which produces an effect or consequence; an antecedent *or antecedents* followed by a certain phenomenon") (emphasis added), they do not address the "materiality" element of "cause". *See also* NSOED at 355 (defining "to cause" as "Be the cause of, effect, bring about; occasion, produce; induce, make, bring it about".)

"of or relating to, or dealing with a cause" and the term 'link', "a unifying element: a means of connecting or communicating."[42] Contrary to New Zealand's reading of "to cause", the manner in which Article 4.2(b) defines 'causal link' suggests that a competent authority is under no obligation to demonstrate that increased imports alone caused the serious injury or threat of serious injury. Rather, Article 4.2(b) requires a competent authority simply to demonstrate a connection between the increased imports and the injury it has found.

49. That the terms 'cause' and 'causal link' do not require that a cause be the sole cause is illustrated by the way these terms may ordinarily be used to describe the causes of disease.[43] To use a medical analogy, the fact that a particular person has experienced coronary heart disease may be traceable to several "causes", including high fat intake, sedentary lifestyle, genetic predisposition, prolonged periods of stress, and so forth. These factors can act together and in combination to produce a single medical condition: each, to use the dictionary terms, "materially aids in calling forth" the disease.

50. Article 2 of the Safeguards Agreement contemplates a similarly synergistic approach to causation. Specifically, it calls for an analysis not just of whether a particular product is being imported in such increased quantities, but also "under such conditions", as to cause or threaten serious injury. Thus, Article 2 contemplates an inquiry into those other factors affecting an industry that may help create the conditions under which increased imports cause serious injury.

51. Moreover, as noted in the United States' first written submission (at ¶ 116), Article 4.2(b) recognizes that factors other than increased imports may be "causing injury to the domestic industry at the same time." This language makes plain that the serious injury or threat of serious injury that the domestic industry has experienced need not be traceable exclusively to increased imports. Thus, neither the ordinary meaning of the term "to cause" nor the relevant language of Article 4.2 supports the claim that the Safeguards Agreement requires increased imports to be the sole cause of serious injury or threat of serious injury.

52. Finally, the negotiating history of the Safeguards Agreement indicates that the drafters did not intend to impose a "sole cause" requirement. In 1988, the United States submitted a paper that explained U.S. procedures for determining injury in Article XIX cases.[44] The paper specifically addressed the U.S. "substantial cause" standard and explained that "the increase in

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[42] *Webster's Third New International Dictionary (Unabridged)* at 355, 1317 (1981), attached hereto as U.S. Exhibit 33.

[43] *See Webster's Ninth New Collegiate Dictionary* at 217 ("agent of a disease" used to explain "causal"), 695 (meaning of 'link' illustrated by "sought a . . . between smoking and cancer") (1985), attached hereto as U.S. Exhibit 34.

[44] *Negotiating Group on Safeguards: United States Procedures for Determining Injury in Article XIX Cases*, MTN.GNG/NG9/W/13 (3 March 1988).

imports must be both an important cause and a cause that is equal to or greater than any other cause of serious injury or threat."[45] Subsequently, the Secretariat issued a note that summarized the United States' discussion of its paper and briefly summarized descriptions by the EEC and Australia of their safeguards regimes. It also summarized the negotiating group's discussions on the causation standard:

> Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes, then it had to be established that increased imports was the principal cause, not just an important or substantive cause.[46]
>
> * * * * *
>
> The Chairman summed up the discussions . . . . There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause.[47]

Notably, there were no suggestions that imports should be the "sole" cause of the serious injury.

53. The Secretariat's summary demonstrates that the negotiators of the Safeguards Agreement were aware that the causation language in Article XIX was susceptible of different constructions, though none of them included the "sole cause" option that New Zealand apparently advocates. In the light of this range of views, it is significant that the negotiators did not seek to specify in the Safeguards Agreement the degree of "causation" required, whether "essential," "substantial," "important", "principal", or otherwise. Consistent with the divergent practice of GATT contracting parties under Article XIX, the Safeguards Agreement does not seek to impose a rigid benchmark for causation, but instead treats "cause" in a manner consistent with its ordinary meaning.

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[45] *Id.* at 6.

[46] *Negotiating Group on Safeguards, Meeting of 7 and 10 March 1988, Note by the Secretariat*, MTN.GNG/NG9/5, at ¶14 (22 April 1988).

[47] *Id.* at ¶ 24.

Isolation Requirement

54. Nothing in the Safeguards Agreement requires that the competent authority examine the effects of increased imports "in isolation" from other factors, even if such examination were in general practicable. The GATT panel in *United States -- Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Salmon from Norway*[48] rejected just such a proposition when it was urged that provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Tokyo Round Anti-Dumping Code) similar to those of the Safeguards Agreement required that the effect of subject imports be considered "in isolation."[49] The report is also relevant for purposes of considering whether the Safeguard Agreement imposes an "isolation" requirement regarding the effects of increased imports.

55. As the panel noted, the Tokyo Round Anti-Dumping Code contained no affirmative guidance on how other causal factors were to be examined. Rather, as it found, the primary focus of the relevant Code provisions concerning injury determinations was on specific factors that authorities should consider in examining the effects of imports. It concluded there was no requirement, "in addition to examining the effects of the imports" under those provisions, that "the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway."[50]

56. Similar to the relevant provision of the Tokyo Anti-dumping Code, Article 4.2(a) sets out specific factors that the authority is to examine in determining whether increased imports have threatened to cause serious injury. None of those factors requires the authority to ascertain the extent of harm due to other causes in order to ascertain the effects of imports viewed in isolation. Indeed, the specific factors that an authority is to examine under Article 4.2(c) may be influenced by a number of conditions. An industry facing increased imports may, for example, sacrifice market share and sales but not cut employment or close facilities. Or it may seek to protect its market share at the price of lost profits. Alternatively, an industry may cut production, close facilities and reduce employment while retaining profitability. Presumably, other factors will affect the nature of its response. Since it is generally the case that multiple factors are affecting a

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[48] See *United States -- Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 30 November 1992, at ¶¶ 544-561 ("*United States -- Atlantic Salmon*") (interpreting provision of Tokyo Round Antidumping Code).

[49] The panel report will be discussed further in response to Question 10, particularly as it addresses the origin of the second sentence of Article 4.2(b) of the Safeguards Agreement.

[50] *United States -- Atlantic Salmon* at ¶ 555.

domestic industry at the same time, if the negotiators had intended to require an isolation analysis in every case, they would have explicitly required such an analysis.

57. The Panel's use of the word "somehow" ("the USITC should somehow have identified the extent of injury . . .") suggests that the Panel understood that the notion of "isolating" the effects of increased imports is problematic, at least in many cases. For example, the multiple factors affecting an industry are often interdependent and attempting to isolate the effects of imports can involve creating counterfactual constructs based on unverifiable assumptions or broad estimates. Nothing in the terms of the Safeguards Agreement can be read to require such constructs.

58. Moreover, economic models that attempt to isolate factors generally assume that a market remains in price equilibrium, a particularly questionable assumption in the circumstances giving rise to a safeguards investigation, where imports have suddenly surged. While equilibrium may be reached over the long run, threat determinations in particular concern the "imminent" future.

59. The Safeguards Agreement, like the Tokyo Round Antidumping Code, does not mandate an analysis in which effects of imports are "isolated" from other effects. It requires authorities to examine all relevant factors bearing on the industry's condition, but it does not instruct them on how to do so.

Question 8.

> **The United States argues that the fortunes of all segments of the industry as defined in the investigation rise and fall together although possibly at different times. The data and discussion in the USITC report seem to indicate that the growers and feeders performed worse during the period of investigation than the packers and breakers. This suggests that the price effects of increased imports were felt first by the producers of live lambs and only thereafter by the packers and breakers, i.e., the producers of lamb meat, in spite of the fact that the imports were of lamb meat. If this is correct, why would this be the case, i.e., would such a situation not depend on the ability of the packers and breakers to *immediately* pass along the *full* price impact of the imports to the growers? Where in the USITC's report is it *demonstrated* that this in fact happened, and on the basis of what factual information? Please explain in detail.**

Answer:

60. This question in effect asks two questions: (1) which segments of the industry were hurt worst; and, (2) which segments were hurt first.

61. The USITC did not rank the segments of the domestic lamb meat industry in terms of which were hurt most. Thus, it did not find that the grower segment or any other segment was hurt more than any other. It found that the price of lamb meat affects all four segments of the industry similarly, and that all four segments of the domestic lamb meat industry suffered financially during 1997 and interim 1998 when the surge in imports occurred. While the USITC cited evidence indicating that the price effects of increased imports were felt first by the packers and breakers of lamb meat and later by the producers of live lambs, it did not find it necessary to find a progression or find that the most injured segment was the segment initially impacted. The facts in a case rarely fall into the perfect sequence. Indeed, it is entirely possible that the grower segment, which was clearly being impacted by the surge in low priced lamb meats imports, was the most injured of the four segments due in part to the residual and receding effects of termination of the Wool Act payments. What is important is that the USITC looked at the condition of the whole industry – all four segments – and concluded that the industry as a whole was threatened with serious injury due to the surge in low priced imports.

62. The principal USITC finding on this point is set out on page I-14 of the USITC report. The USITC stated as follows:

> There is also evidence that the price of lamb meat affects all four industry segments similarly – that is, when processors do well, growers and feeders also benefit, *but when processors confront lower prices, they pass the lower prices back to feeders and then growers, and all suffer to some extent.* [Emphasis added.] As described below, all four segments suffered financially over the period of investigation, and all experienced significant declines in the unit value of their sales at the end of the period. No representatives in any of the four industry segments testified that the economic interests of packers and breakers diverged from those of growers and feeders.

63. The USITC's finding is amply supported by evidence in the record of the investigation. For example, the USITC report shows that the value of net sales of packers and breakers fell from 1996 to 1997, and between interim 1997 and interim 1998.[51] Operating income for packers was at its lowest point at the end of the period of investigation. Representatives of packer and breaker firms reported having to reduce prices, sometimes selling at a loss in order to compete with low-priced imports.[52] The USITC also cited testimony at its injury hearing on the pass-

[51] USITC Report at I-19.

[52] USITC Report at I-19.

through effect from witnesses representing different industry segments.[53] The USITC quoted testimony of a rancher to the effect that "lower import prices forced processors to reduce prices for the carcasses they bought from packers, who in turn had to reduce the prices they paid to feedlots for live lambs." The rancher explained that because of falling prices at the processor level, feedlot operators sold their lambs in the spring of 1998 for less than they paid for them in the fall of 1997, and had to reduce the price they could pay for lambs in the fall of 1998. The USITC further found, quoting the rancher, that "lower import prices 'forced the entire U.S. lamb meat industry in successive waves to substantially reduce the prices they could pay for the lamb.'"[54]

64. The phrase in the second sentence of the question that refers to performance "during the period of the investigation" suggests that the question might be premised at least in part on a consideration or comparison of industry data for some of the four segments during the period that preceded the surge in imports. While the USITC examined imports and industry conditions during the period 1993-September 1998, the full "period of the investigation," as explained in the United States' First Submission, the USITC's threat determination was based on the surge in imports that occurred after 1996 and the resulting downturn in industry indicators, and the projected continuation of these trends.[55] The evidence in the USITC's report concerning the sequence of events that occurred after the surge in imports fully supports the USITC's determination.

Question 9

> **The United States has argued that even if the domestic industry would be defined as comprising only packers, packers/breakers and breakers, the investigation would have led to a determination that a safeguard measure is necessary to prevent a "threat of serious injury" and facilitate adjustment. Could the United States indicate precisely which information in the published report supports this statement?**

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[53] USITC Report at I-14, n.50.

[54] USITC Report at I-14, n.50. *See also* similar testimony of Joseph Casper, Vice President, Chicago Lamb & Veal Co., a breaker, transcript of injury hearing at 22, attached hereto as U.S. Exhibit 35; testimony of Harold Harper, owner of a feedlot operation, transcript of injury hearing at 30, attached hereto as U.S. Exhibit 36 ("Here is how it happened. In the fall of '97, I bought lambs for approximately $1 a pound. However, when I went to sell the lambs in the winter of '97 and '98, I could only get 40 and 60 cents a pound. Why? Because the packer that I had traditionally supplied with lambs was forced to reduce his prices to me because his customer, the processor, had to lower his prices substantially to compete with imports. The impact of the incredibly low prices offered by importers was felt throughout the distribution chain as each sector was compelled to demand price breaks from their suppliers to try to remain competitive.")

[55] *See, e.g.*, United States' First Written Submission at ¶¶ 79-82.

Answer:

65. The USITC stated explicitly that "we find that all sectors show evidence of a threat of serious injury."[56] The USITC gathered data on all four segments of the domestic lamb meat industry so that it would have the ability to include domestic growers and feeders in the domestic industry if the facts supported such a finding. Specifically, the USITC gathered data and other information that directly related to lamb meat packers, packers/breakers, and breakers with respect to market share, domestic lamb meat production, shipments, profitability, capacity, capacity utilization, inventories, employment, productivity, and prices. In its causation analysis it also considered possible causes of injury other than imports at the processor level.

66. The USITC's findings show why it found evidence of the threat of serious injury if the packer and breaker sectors were considered alone. That analysis focused on the 1997-98 period, when imports' share of the U.S. lamb meat market rose from 20.7 percent in 1996 to 24.8 percent in 1997 and to 30.7 percent in interim 1998.[57] It also found that the 9.7 million pound increase in lamb meat imports in 1997 was mirrored by a decline in U.S. lamb shipments of 8.4 million pounds.[58] Based on data developed by the U.S. Department of Agriculture, the USITC found that both domestic production and shipments of lamb meat fell in 1997, and that production continued to fall in interim 1998.[59]

67. Based on responses to USITC questionnaires, the USITC found that the value of net sales and operating income of packers and breakers declined significantly. The USITC referenced the percentage decline in its confidential report. The USITC found that the operating income for most packers and breakers was at the lowest point at the end of the period of investigation in 1997 and interim 1998. The USITC also observed that representatives of packer and breaker firms reported having to reduce prices, sometimes selling at a loss, in order to compete with low priced imports.[60] The USITC also found that firms in the packer and breaker segments reported difficulties in recouping new investments in plant and equipment and in repaying loans.[61]

68. The USITC found that packer capacity was lower in 1997 than earlier in the investigation, although higher in interim 1998 than in interim 1997. It found that packer capacity utilization, after having risen irregularly during 1993-96, fell in 1997 and was at its lowest level

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[56] USITC Report at I-16, n.61.

[57] USITC Report at I-24, II-50 (Table 32).

[58] USITC Report at I-24.

[59] USITC Report at I-18.

[60] USITC Report at I-19.

[61] USITC Report at I-21.

of the investigation period, 73.5 percent, in interim 1998, significantly below the level the level of 85.7 percent in interim 1997.[62] The USITC found that breaker capacity utilization declined significantly, although it noted that breaker capacity had also increased significantly.[63]

69. The USITC collected extensive data comparing domestic and imported lamb meat prices. It found that U.S., Australian, and New Zealand lamb meat prices were in most cases lower in the second half of 1997 and the first three quarters of 1998 at the time that imports were rapidly increasing. It found that further increases in imports would be expected to put further downward pressure on prices in the U.S. market.[64] The USITC found that the financial performance of "the various segments worsened due to declining sales and falling prices, as a result of the increase in imports."[65]

70. In examining other possible causes of injury, the USITC made findings specific to the packer/breaker segments of the domestic industry. Specifically, it found none of these other possible causes – competition from other meat products, increases in input costs, concentration in the packer segment, and the effectiveness of domestic marketing plans – to be causes of any significance, and that the only cause of significance of the threat of serious injury was increased imports. With respect to competition from other meat products, the USITC found no evidence that other meat products were displacing lamb meat, but rather that domestic consumption of lamb meat had been relatively steady since 1995.[66] With respect to input costs, the USITC found that costs of inputs for packers and breakers rose moderately in line with production; it thus concluded that there had been no increase in input costs that explained the sharp decline in industry profits, and that no increase was predicted in the imminent future.[67] With respect to packer concentration, the USITC noted petitioners' claim that concentration had actually fallen during the most recent 5 years. The USITC also reasoned that an undue level of concentration among packers would have suggested that they would have been sheltered from the effects of low-priced imports, and would have been able to pass through lower prices more readily to feeders and growers. Instead, packers experienced deteriorating profits and operated at a loss in interim 1998.[68]

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[62] USITC Report at I-20.

[63] USITC Report at I-20.

[64] USITC Report at I-24.

[65] USITC Report at I-24.

[66] USITC Report at I-25.

[67] USITC Report at I-25.

[68] USITC Report at I-25-26.

Is the USITC's finding that increased imports were a "substantial cause" of threat of serious injury consistent with the Safeguards Agreement and GATT 1994?

Question 10.

Would the United States agree that Article 4.2(b) requires that increased imports, even in isolation from other causal factors, must be demonstrated to cause a threat of serious injury? If not, what in your view is the correct reading? Please explain. If so, how does the US "substantial cause" standard applied in this case ("important cause and not less important than any other single cause") reconcile with this requirement?

Answer:

71. As demonstrated in response to Question 7, the Safeguards Agreement does not require increased imports to be the sole cause of serious injury or threat of serious injury. The "substantial cause" standard established under U.S. law comports fully with the requirement in Article 4.2(a) to determine whether increased imports "caused" serious injury or threat of serious injury. In the same response, the United States demonstrated that Article 4.2(a) does not require a competent authority to conduct an isolation analysis and explained why the results of any such analysis would be suspect.

72. Nothing on the face of Article 4.2(b) mandates an isolation analysis of the type the panel describes. The second sentence of that article simply requires the competent authority to avoid attributing to increased imports injury caused by other factors. That can be done, as the USITC did, simply by examining each possible injury factor in turn to determine its effect, if any, on the industry's condition.

73. The derivation of Article 4.2(b), second sentence, argues strongly against construing it to require an "isolation" analysis. Prior to the completion of the Uruguay Round, the language incorporated in that sentence was understood not to impose an isolation requirement.

74. Article 4.2(b), second sentence, is drawn from similar language in Article 3:4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (also known as the Tokyo Round Anti-Dumping Code). The second sentence of Article 3:4 provided that "[t]here may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports."[69] Well before the

[69] The second sentence of Article 4.2(b) of the Safeguards Agreement reads, "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to

(continued...)

Uruguay Round negotiations concluded in 1994, a GATT dispute settlement panel interpreted Article 3:4, second sentence, in a manner that flatly rejected the argument that New Zealand makes here, concluding that the requirement:

> not to attribute injuries caused by other factors to the imports . . . did not mean that, in addition to examining the effects of imports under Article 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway.[70]

The *Norwegian Salmon* panel held that it was sufficient that the USITC had not ignored other factors it found had caused adverse effects on the U.S. industry. In that case, the USITC did not eliminate the possibility that other factors had caused adverse effects.[71]

75. As in the current case, the Panel considered whether the USITC determination had adequately addressed increased production of other, similar products that might have affected prices for the subject product. Although the USITC did not specifically address the issue in its determination, "the Panel considered that the specific factors discussed by the USITC suggested that the increased availability of Pacific salmon could have had only a limited effect on domestic prices in the United States of fresh Atlantic salmon."[72]

76. Likewise, the Panel upheld the USITC's discussion of problems unique to the industry as a possible alternative cause of injury, finding it sufficient that the industry had recently been profitable and its more recent financial performance was worse than would otherwise be expected.[73] Discussing the USITC's findings concerning the effects of increases in non-dumped imports as an alternative cause, the Panel held it sufficient that "it could not, in the view of the

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[69] (...continued)
increased imports." The dependent clause of this sentence, like the parallel provision in the Tokyo Round Antidumping Code, recognizes that other factors may, in some cases, but not all, also be causing injury. The independent clause substitutes "shall not" for "must not" and, in keeping with the different subjects of the agreements, "increased imports" for "dumped imports". Thus, the changes made in the adoption of this language into the Safeguards Agreement are insubstantial.

[70] *United States -- Atlantic Salmon* at ¶ 555.

[71] *See United States -- Atlantic Salmon* at ¶ 547, quoting the USITC Report.

[72] *United States -- Atlantic Salmon* at ¶ 558.

[73] *United States -- Atlantic Salmon* at ¶ 559.

Panel, reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries."[74]

77. In no instance did the *United States -- Atlantic Salmon* panel find that the obligation not to attribute injury due to other causes to the subject imports required that the authority isolate the effects of subject imports and determine whether the amount of injury they caused was material. In the current case, the USITC determination goes well beyond what the *United States -- Atlantic Salmon* panel held was sufficient. In that case, the panel held that the USITC need not explicitly address the effects of each proposed alternative cause of injury. Unlike that case, in the investigation at issue here, the USITC examined each proposed alternative cause. The *United States -- Atlantic Salmon* panel did not require that the USITC find that the effects, for example, of non-subject imports were not more important than those of dumped imports. The USITC examination of causation in safeguards investigations must, under U.S. law, contain conclusions that no other cause is more important than increased imports. Thus, the U.S. examination of alternative causes goes beyond what was held to be sufficient in *United States -- Atlantic Salmon* to assure that injury due to other causes is not attributed to increased imports.

78. If the framers of the Safeguards Agreement had wanted to impose an "isolation" requirement, they would not have been content with language nearly identical to text that had already been interpreted, well before the Uruguay Round concluded, not to impose such a requirement. The United States would be deprived of the benefit of its bargain if Article 4.2(b) of the Safeguards Agreement were interpreted to require an "isolation" analysis.

Question 11.

> **The USITC found that "the increased imports are an important cause, *and a cause no less important than any other cause* of the threat of serious injury to the domestic lamb meat industry". In its first written submission in this case, the United States argues that the USITC found no evidence that any other alleged factors might have significantly affected the condition of the domestic industry during 1997 and interim 1998 (para. 108). Please explain how you reconcile the apparent difference between the language of the USITC report and the language of the US first written submission, i.e., where in the USITC report can the findings referred to in the US first written submission be found?**

Answer:

79. The findings referred to by the United States in ¶ 108 of its first written submission are in the USITC's evaluation of the evidence with regard to each of the other possible causes of injury

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[74] *United States -- Atlantic Salmon* at ¶ 557.

alleged or identified during the investigation. While the USITC framed its finding in terms of the U.S. statute, its evaluation of the evidence with respect to each of those other possible causes – termination of the U.S. Wool Act payments, competition from other meat products, increased input costs, overfeeding of lambs, alleged concentration in the packer segment, and effectiveness of the industry's marketing program – makes it clear that no asserted cause other than increased imports significantly contributed to the threat of serious injury.

80. With respect to the impact of termination of the U.S. Wool Act, the USITC found that the payments under the act were largely phased out in 1994 and 1995 and terminated in 1996, *before* the surge in imports. It found that the industry had experienced some recovery since full termination of the payments, and that remaining effects of termination were receding with each month. Accordingly, the USITC's report shows no nexus between the diminishing effect of the termination of Wool Act payments and its conclusion that the domestic industry's condition would *worsen* in the imminent future. Although the USITC addressed the Wool Act termination as an alleged "other cause," it is clear that the termination was not such an other factor within the contemplation of Article 4.2(b), which requires such a factor to be causing injury "at the same time" as increased imports. Moreover, the USITC found that the effects of termination could only have had an indirect effect on the packer and breaker segments of the industry, since firms in those two segments never received payments under the Wool Act.[75]

81. With respect to competition from other meat products, such as beef, pork, and poultry, the USITC found that domestic per capita consumption of lamb meat had been relatively steady since 1995, indicating no shift by consumers away from lamb meat to other meat products.[76] The USITC also found no reason to anticipate such a shift in the imminent future. Thus, although this factor was alleged as another cause of injury, the USITC rejected the allegation.

82. With respect to increased input costs, the USITC found that expenses for growers rose at a modest rate and then fell in interim 1998, that expenses for feeders increased at a faster pace but not at a dramatic pace, and that input costs for packers and breakers rose moderately in line with production. The USITC concluded that there had been no significant increase in input costs that explained the sharp decline in industry profits, and no increase was predicted in the imminent future.[77] In short, the USITC found no causal link between input costs and the threat of serious injury.

83. The USITC also considered the allegations of the Australian and New Zealand respondents in the investigation that U.S. feeders in 1997 held lambs unduly long in feed lots and

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[75] USITC Report at I-24-25.

[76] USITC Report at I-25.

[77] USITC Report at I-25.

that such over-weight "fat" lambs depressed prices when sent to slaughter. Here, too, the USITC rejected the allegation on the facts. The USITC noted that U.S. Department of Agriculture data showed that the fat content of domestic lambs was lower in 1997 than earlier in the period of investigation. It also found that, even if it accepted respondents' allegations, these "fat" lambs would have accounted for no more than a small share of total domestic lamb production. The USITC also noted that respondents did not allege that such overfeeding was currently taking place or represented a future threat.[78] Thus, again, this was a factor that was not occurring "at the same time."

84. With respect to concentration in the packer segment, the USITC noted petitioners' claim, unrefuted by respondents, that concentration in the packer segment had actually decreased over the past five years. Moreover, the USITC found that undue concentration would have suggested that packers would have been sheltered from the effects of low-priced imports and better able to pass through lower prices to feeders and growers. Instead, packers, like other segments of the domestic lamb meat industry, experienced deteriorating profits in the latter part of the investigation and operated at a loss in interim 1998.[79] The USITC also rejected this allegation on the facts.

85. Finally, the USITC considered the industry's failure to develop an effective marketing program to expand demand in light of the repeal of Wool Act payments.[80] The USITC was not required to assume that it was appropriate to consider the absence of such a program to be a factor causing injury under Article 4.2(b), as opposed to a possible adjustment measure to address injury. It would indeed be a paradoxical interpretation of the Safeguards Agreement to hold that, because an industry had not earlier applied adjustment measures, it is prevented from obtaining the relief necessary to make adjustment measures effective.

86. In any event, the USITC found only that development of an effective program could (*i.e.*, had the potential to) have had an important impact. It did not find that the industry could have developed a program that would have been successful between the end of Wool Act payments and the onset of the import surge.[81] The USITC did not find the failure to develop programs to

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[78] USITC Report at I-25.

[79] USITC Report at I-25-26.

[80] USITC Report at I-26.

[81] Indeed, the Commissioners' findings on remedy suggest the contrary. Three Commissioners observed that it would "take time" to develop new markets and products that expand demand. USITC Report at I-34. Indeed, those Commissioners' remedy recommendation made clear that a demand-expansion program alone could not have prevented serious injury in the imminent future, particularly since it recognized that production-side adjustment, as well as marketing, was needed to make the U.S. industry competitive. USITC Report at I-34, n.169. Two Commissioners noted that there was an unavoidable "degree of uncertainty" as to whether the industry, even with

(continued...)

expand demand, about whose potential benefits it could only have speculated, a factor causing the threat of injury. Rather, it referred to its decision as a whole, in which (as mentioned above) it found that consumption, which had previously declined, had stabilized since 1996 when Wool Act payments ended. It also found that there was no reason to expect consumer preference for lamb to change in the imminent future.[82] Thus, the USITC found stabilized demand as a condition under which increased imports would cause U.S. producers to lose sales, lower prices or both in the imminent future.[83] In short, the report as a whole shows that the USITC did not regard lack of demand enhancement programs as causing worsening conditions in the imminent future.

87. In sum, the USITC's findings establish why none of the proposed alternative causes of injury should be considered "factors other than increased imports [that] are causing injury to the domestic industry at the same time" under Article 4.2(b). The fact that the USITC stated its conclusions in terms of whether, in keeping with the U.S. statute, proposed other causal factors were more important than the increased imports does not change this conclusion. As is shown elsewhere, even if the USITC had found them to be relevant alternative causes, its findings under the U.S. standard would have been adequate. However, even if the Panel holds to the contrary on that issue, the fact that the USITC stated its conclusions in the terms required by the U.S. statute is not properly at issue in this case.

88. As is discussed in answer to the Panel's first question to the United States, the sole requirement to state legal conclusions appears in Article 3.1 of the Safeguards Agreement, and complainants have not attacked the USITC's determination under that article. Thus, the only question on this issue before the Panel is whether the USITC report pursuant to Article 4.2(c) contains a detailed analysis of the case and demonstrates the relevance of the factors examined such that it shows compliance with Article 4.2(b). Regardless of the terms in which the USITC expressed its conclusions, its examination of other asserted causal factors meets the requirements of Article 4.2(b) even as interpreted by New Zealand.

Question 12.

If in two hypothetical situations increased imports accounted for the same proportion of serious injury (e.g., 30 per cent), but in the first situation one of the "other factors" accounted for more than 30 per cent, while in the second situation no "other factor" individually caused more than 30 per cent, would the US

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[81] (...continued)
safeguard protection, could effectively implement adjustment. USITC Report at I-41.

[82] USITC Report at I-22, I-25.

[83] USITC Report at I-22.

"substantial cause" standard permit the imposition of a safeguard measure in the first situation, but not in the second one?

Answer:

89. As will be recognized from the answers that the United States has given the Panel in Questions 7 and 10, this question poses a hypothetical situation that does not accord with the nature of the USITC analysis under the U.S. statute. The USITC does not, as this question assumes, isolate the particular proportion of injury caused by each factor and then compare their percentages. Rather, it determines whether increased imports are important within the mix of causes of overall serious injury and then decides whether other factors are more important. "Importance" in this sense is seldom, if ever, reduceable to numerical percentages.

90. Indeed, because Article 4.2 does not set a single benchmark for "measuring" serious injury, it is difficult to see how, even if the effects of different causes of injury could be isolated, the percentages of total injury that those effects might represent could be ascertained and compared. Article 4.2(a) enumerates specific factors that competent authorities are to evaluate. To the extent that they have discrete effects, different causal factors may affect different economic indices differently. Moreover, the various enumerated factors are not commensurate with each other. For example, a factor that lowers productivity may raise employment if production is not reduced. The Agreement provides no standard according to which such variable effects are to be compared. The Panel's question presupposes a precision in the evaluation of causal factors that is incommensurate with the terms of the Agreement.

91. The Panel's question is, however, correct in its recognition that the U.S. statute directs the USITC, in determining whether increased imports are a substantial cause, to evaluate not only whether their effects are important in themselves, but also whether other causes of injury may be more important causes of the overall serious injury or threat of serious injury. The United States does not necessarily contend that this second step in its statutory causation analysis is required by the terms of the Safeguards Agreement. This standard is, however, consonant with the objective set out in the preamble to the Safeguards Agreement that recognizes the "importance of structural adjustment." If other causes of injury are predominant, it is unlikely that addressing increased imports alone will facilitate adjustment. If, on the other hand, increased imports are an important causal factor and no other is more important, then imposing a safeguard measure on increased imports can be more reasonably expected to aid an industry in its adjustment efforts.

Question 13

Does the United States agree with the characterization in New Zealand's oral statement (para. 51) that the United States "admits" that a safeguard measure can

be applied even where increased imports are, e.g., only one of three equal causes of a threat of serious injury? Please explain.

Answer:

92. New Zealand's speculation as to a possible result under U.S. law is irrelevant in this proceeding because the USITC did not find that increased imports were one of three equal causes of the threat of serious injury. While the USITC framed its finding in terms of U.S. law, finding that none of the other alleged causes of injury was a more important cause than increased imports, the USITC identified only increased imports as being an important cause of the threat of serious injury. Indeed, the USITC report shows that increased imports were the only cause of any significance of the threat of serious injury. New Zealand's hypothetical question has no bearing on the finding that the USITC actually made or the measure that the United States applied.

93. Moreover, New Zealand's hypothetical ignores the fact that, in order to find that increased imports are a "substantial cause" of serious injury or threat of serious injury, the USITC must under U.S. law find that increased imports are both an "important" cause and "not less than any other cause."[84] As the United States stated in ¶ 121 of its First Written Submission, the legislative history of the U.S. provision makes clear that a cause of injury would not be an important cause of injury, and thus not a "substantial" cause, when it was one of many such causes, even if it was equal to or greater than any other cause. The U.S. Senate committee that drafted the substantial cause standard stated, "The [USITC] Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes or threats of injury."[85] Accordingly, it cannot be said in the abstract that, if the USITC found that increased imports were one of three equal causes of serious injury, the USITC would see fit to regard any of those causes as "important."

94. Moreover, New Zealand's position, as paraphrased in this question, misstates the manner in which the U.S. statute operates. The statute requires the United States to determine whether increased imports are an important cause of serious injury or threat of serious injury. Only if it finds increased imports to be an important cause does the USITC compare their importance to that of other causal factors. Thus, it is possible for the USITC to conclude that increased imports are not an important cause even if, had it proceeded to compare the effects of increased imports to those of multiple other causes, it would have found no other cause to be more important than increased imports.

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[84] 19 U.S.C. 2252(b)(1)(B), attached hereto as U.S. Exhibit 37.

[85] *Trade Reform Act of 1974, Report of the Committee on Finance . . . on H.R. 10710*, S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 120-21 (1974), attached to the United States' First Written Submission as U.S. Exhibit 16.

How representative are the facts and evidence on which the determination of the USITC and the decision of the President were based?

Question 14.

Could you indicate the total number of operators in each of the industry segments (i.e., growers, feeders, grower/feeders, packers, breakers and packer/breakers, etc.), how many of those received questionnaires in each segment, how many responded and which share of the production by each industry segment is accounted for by the companies that provided usable questionnaire data? Where in the USITC's report can this information be found? Did the collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

Answer:

95. The evidence of record shows the following numbers of operators in each of the industry segments:

Growers:	74,710 in 1997.[86]
Feeders:	11[87]
Grower/Feeders:	18[88] (This number reflects a total of 11 feeders, plus those growers who reported that they also conduct feeder operations).[89]
Packers:	The exact number is not known. USDA data show that 9 plants accounted for 85% of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep.[90]

[86] USITC Report at I-18, II-11, and II-12.

[87] USITC Report at II-13.

[88] USITC Report at II-13.

[89] USITC Report at II-13.

[90] USITC Report at II-15, n.57.

Breakers: Less than 10 major firms.[91]

Packer/Breakers: 4.[92]

96. The number of operators receiving questionnaires in each segment is as follows:

Growers: 110[93]

Feeders: See Grower/Feeders

Grower/Feeders: 11[94]

Packers/Slaughterers: 17[95]

Breakers: 16[96]

Packer/Breakers: 4[97]

97. The following responded to USITC questionnaires:[98]

Growers and Grower/Feeders: 70[99] (USITC received usable data from 57 growers).[100]

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[91] USITC Report at II-15.

[92] This number is based on USITC questionnaire responses from 4 packer/breakers.

[93] USITC Report at I-17 and II-11.

[94] USITC Report at II-13.

[95] USITC Report at II-14.

[96] USITC Report at II-15.

[97] This number is based on USITC questionnaire responses received from four packer/breakers.

[98] The number of responses with usable data is also noted, although not each usable response contained usable information on all items requested.

[99] USITC Report at II-11. The Commission sent questionnaires to approximately 110 firms believed to be involved in raising lambs. Responses were received from approximately 70 growers and growers/feeders.

[100] USITC Report at I-17 and II-11.

Grower/Feeders: 18[101] [102]

Packers/Slaughterers: 6[103] (USITC received usable data from 5 firms on packing operations).[104]

Packer/Breakers: 4[105] (USITC received usable data from 2 firms).[106]

Breakers: 5[107] (USITC received usable data from 4 breakers).[108]

98. The share of production by each industry segment is accounted for by the companies that provided usable questionnaire data:

Growers: }
Feeders: } }
Grower/Feeders:[109] }

All three groups = 57 usable questionnaire responses representing an estimated 6%

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[101] USITC Report at II-13. The Commission sent questionnaires to 11 firms believed to be feeders and received responses from 18 feeder operations, including several growers that also maintain feeder operations. USITC Report at II-13, n.46 states "[s]ome of the firms identified as feeders are also growers. Some of these firms provided questionnaire responses on their feeding operations and others could not separate the data for the two operations."

[102] USITC Report at II-29, n.89, regarding the financial condition of the industry, states that "[t]en firms reported they were grower/feeders; however the questionnaire responses of seven of the firms indicated that they fed only their own live lambs. Those seven producers were reclassified by Commission staff to growers. [Financial] [d]ata for the three grower/feeders are presented separately from growers and feeders because of the difficulty in separating growing operations from feeding operations."

[103] USITC Report at II-14.

[104] USITC Report at II-14.

[105] This number is based on USITC questionnaire responses received from four packer/breakers.

[106] USITC Report at II-24 and II-33 n. 93.

[107] USITC Report at II-15.

[108] USITC Report at II-15.

[109] USITC Report at II-29 n.89, regarding the financial condition of the industry, states that "[t]en firms reported they were grower/feeders; however, the questionnaire responses of seven of the firms indicated that they fed only their own live lambs. Those seven producers were reclassified by Commission staff to growers. [Financial] [d]ata for the three grower/feeders are presented separately [in the report] from growers and feeders because of the difficulty in separating growing operations from feeding operations."

		of lamb production (lamb crop; the number of lambs reported to be born during the year) in 1997.[110]
Packers:	}	
Breakers:	}	} 5 responding packers representing an estimated 76% of the sheep and lambs slaughtered (based on U.S. Department of Agriculture (USDA) data).[111] (USDA reported that 9 plants accounted for 85% of sheep & lamb slaughtered in 1997).[112]
Packers/Breakers:	}	
		Of 16 questionnaires sent to breakers, 5 responded and 4 provided usable data. The American Meat Institute estimates that 75% of lamb carcasses currently are processed by breakers. The other 25% are broken by packers at the slaughter plants.[113]

Where in the USITC's report can this data be found?

99. Please see the citations provided in the response to the earlier portion of this question.

Did the collective output of responding operators in each of the industry segments represent a major proportion of the total domestic production of that segment within the meaning of Article 4.1(c)? Please explain.

100. As discussed in the answer to Question 16, the Safeguards Agreement does not set a fixed proportion as constituting "a major proportion." The information received from questionnaires in each segment was, when combined with other information received by other means, sufficient to permit the USITC to make objective conclusions about each segment and the industry as a whole.

Question 15.

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[110] USITC Report at I-17 and II-11. However, USITC financial data was based on 49 questionnaire responses of growers representing 5% of the U.S. lamb crop in 1997 (USITC Report at II-24) and USITC financial data on feeders represented one-third of the slaughter lambs fed in feedlots in 1997. (USITC Report at II-24).

[111] USITC Report at II-14 and II-24.

[112] USITC Report at II-14 n.48 and II-15 n.57.

[113] USITC Report at II-15 n. 63.

How did the USITC decide to which specific companies to send the questionnaires (e.g., how did the USITC select the 110 growers of the roughly 70,000 in the United States)? Did the USITC send questionnaires only to companies associated with the petitioners, or to other companies as well? Please explain and indicate where in the USITC's report this information can be found.

Answer:

101. The USITC, based on a listing of all companies that had received Wool Act payments before the termination of the program, sought to select a group to receive questionnaires that would be reasonably calculated to yield both the highest level of response and the greatest proportion of industry production.

102. Given the total level of production in the industry and the number of firms involved, the USITC knew that a large number of producers were extremely small, growing fewer than 10 lambs per year. As a result, it sought to send questionnaires to the largest producers, recognizing based on experience that it would be very unlikely to receive any level of response from the large number of extremely small producers. The USITC selected the largest producers from the list of all producers based upon the level of Wool Act payments they had received.

103. All growers in the United States were associated with petitioners, since membership in the petitioning association was automatic based upon receipt of Wool Act payments.[114] Thus, the USITC could not send questionnaires to "unassociated" growers. Only a few growers were named individually as petitioners, so the great majority of questionnaire recipients consisted of companies with no particular known view of the safeguard proceeding.

104. Information describing the USITC's decision to select these 110 questionnaire respondents is provided in the USITC Report at I-17. The USITC identified questionnaire respondents in the other three industry segments based on names and addresses which petitioner supplied in the petition pursuant to USITC regulation 19 C.F.R. § 206.14(b)(3).[115] The regulation requires that the petition contain the names and locations of all producers of the domestic article known to the petitioner (meaning, not simply those supporting the petition), to the extent such information is available from governmental and non-governmental sources.

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[114] The petitioning American Sheep Industry Association, Inc. ("ASI") is a federation of 50 state organizations of lamb growers and feeders representing the nation's approximately 75,000 U.S. sheep producers. Its membership therefore accounts for virtually 100 percent of U.S. production of live lambs. *See* Petition For Relief From Imports of Lamb Meat Under Section 201of the Trade Act of 1974, dated September 30, 1998, at 5, attached hereto as U.S. Exhibit 38.

[115] Attached hereto as U.S. Exhibit 39.

105. Information describing the USITC's decision to select at least the nine feeders named in the petition is provided in the USITC Report at II-13; its decision to send questionnaires to 17 packers is provided at II-14; and its decision to send questionnaires to 16 breakers is provided at II-15 of the USITC Report.

Question 16.

> **Does the United States consider that as long as the USITC undertakes a questionnaire survey exercise, and as long as some responses are received, the USITC can proceed on the basis of those responses, regardless of the percentage of total production for which they account? Or would there be circumstances in which the response rate to the questionnaires and/or the percentage of the total industry represented by the questionnaire responses did not account for a major proportion of the industry? If the latter, what would those circumstances be, and has this ever happened? Please explain.**

Answer:

106. Nothing in the Agreement suggests that a competent authority should not render a decision simply because it has been unable to obtain questionnaire responses from a particular percentage of producers in a highly fragmented industry. Indeed, nothing in the Agreement requires the authority to issue questionnaires at all. Thus, the share of domestic production reflected in questionnaire responses would not be determinative of whether the authority can or should proceed with its investigation. Article 4.2(a) of the Agreement obligates a member to "evaluate all relevant factors of an *objective* and quantifiable nature"[116] (emphasis added), but it does not state how this is to be done. It does not prescribe any specific approach that an authority should follow in making its evaluation, or even refer to the term "questionnaires." Consequently, nothing in the Agreement precludes an authority, in evaluating the relevant factors, from relying entirely on data collected by another government agency, or information furnished by interested parties. Thus, the issuance of questionnaires may be just one of the methods that an authority chooses, but is not required to used, in obtaining information. Provided that the information evaluated is objective and the authority has conducted an objective analysis, the authority has met its obligation.

107. Although the USITC endeavors in most investigations to send questionnaires to all known producers, this approach is impossible when the domestic industry is comprised of a very large number of small producers. Moreover, in fragmented industries, communicating directly with a large proportion of producers may be impracticable in any reasonable time frame, when no producer or reasonably reachable group of producers accounts for a significant share of

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[116] Safeguards Agreement, Article 4.2(a).

production. In such a situation the USITC compares, as it did concerning the grower segment of this industry, its information from several sources to assure that the information on which it relies is sufficiently representative to allow it to make objective inferences about the industry as a whole. Such an approach entirely accords with the requirements of Article 4.2(a).

108. Nothing in the use of the phrase "a major proportion" in the definition of the term domestic industry in Article 4.1(c) of the Agreement affects this analysis. First, it is Article 4.2(a), not the definition of "domestic industry", which sets the standards for investigations. As indicated above, under Article 4.2(a), it is sufficient that the relevant factors be evaluated on an "objective" basis, a standard that is satisfied when conclusions are reached on a data set or sets that the competent authority has reasonably assured is not biased and provides a reasonable basis for making inferences about the entire industry. Second, even if, although the agreement does not require questionnaires, Article 4.1(c) did suggest that some minimum number of producers should receive questionnaires, the words "major proportion" are undefined. They are preceded by the article "a" (as opposed to the article "the"), thus indicating that the "major proportion" means "less than 50 percent." Except that it may be less than 50 percent, the phrase gives no fixed percentage.

109. The flexibility of this phrase suggests that the percentage that would constitute a major proportion could be different for highly fragmented industries than for concentrated industries. If this were not the case, the Safeguards Agreement would afford practical relief to concentrated industries but not to those industries that are likely to be most highly competitive. Such a result would be economically perverse and contrary to the express purpose of the Agreement "to enhance rather than limit competition in international markets." The Agreement also does not suggest that investigations be extended in order to achieve some fixed percentage of questionnaire responses because, as the Appellate Body has recalled, safeguards under GATT Article XIX are designed to address "emergency" situations. Such investigations cannot be prolonged in order to achieve a fixed ideal of data coverage. On these bases too, whether the investigation has been adequate should be evaluated in terms of whether the competent authority undertook an investigation that was reasonably calculated to obtain objective information about the industry as a whole.

110. Finally, in this case, it is also important to note that none of the respondents in the investigation, who had access to the raw grower questionnaire data under a USITC administrative protective order, argued that the data were biased or inaccurately portrayed the condition of growers.[117] Rather, those parties' representatives urged the USITC to rely on that data. One of the evident purposes of Article 3.1, which requires that authorities give interested parties an opportunity to present evidence and their views, including responding to the presentations of other parties, is to help assure that, by exposure to conflicting views, an

[117] USITC Report at I-17.

authority receives an objective picture of the information before it. When the parties before it agree that the information the authority has received is objective, the authority should be able to rely on it.

Is the measure imposed by the U.S. President, which differs from the USITC's recommendation, consistent with the United States' obligations under the Safeguards Agreement and the GATT 1994?

Question 17.

Is it reasonable for a Panel to assume that the remedy recommended to the President by a plurality of the USITC is sufficient to prevent serious injury and facilitate adjustment? If not, why not? If so, on what basis did the President not adopt the USITC recommendation? Please provide the factual basis and reasoning that supports the measure as actually applied in terms of Article 5.1, first sentence.

Answer:

Plurality Recommendation

111. It would not be reasonable for a Panel to assume that a USITC plurality remedy, if applied, would be sufficient to prevent serious injury and facilitate adjustment. Neither U.S. law nor the Safeguards Agreement provides any basis for such an assumption. Moreover, the fact that the six USITC Commissioners split three ways on an appropriate remedy demonstrates that the plurality recommendation should not be presumptively regarded as adequate.

112. U.S. law does not intend the USITC remedy recommendation to be understood as a definitive statement of remedial sufficiency. Section 203(a)(2)(A) of the Trade Act of 1974, as amended, requires the President to take the USITC's recommendation into account (along with other enumerated factors) in determining what remedy may be appropriate. But there is no requirement that he adopt the recommendation, or give it weight. He is free to apply a different remedy, or no remedy at all. The same provision of law also requires the President to take the USITC's *report* into account in fashioning the remedy. This means the President is to review the USITC's injury and causation findings, not just its remedy recommendation, and reach his own conclusion on what remedy would be most appropriate to address those findings.

113. The USITC plurality recommendation remedy presented the views of just three of the six USITC Commissioners. The three other Commissioners recommended different remedies, and each concluded that the plurality's remedy was insufficient to prevent serious injury and facilitate adjustment. All six Commissioners considered that four years of import relief were required. The President granted relief of three years and one day.

114. The three remedy recommendations also contained various suggestions on appropriate domestic assistance measures. The domestic assistance that the President ultimately provided differed from those recommendations. As the time they issued their remedy recommendations, the Commissioners did not know what level of assistance the President would provide and thus they did not (and could not) calibrate their import relief recommendations to take account of that level.

115. The USITC plurality apparently considered that leaving imports at their high-water mark (1998 levels) would not result in further injury and would place the industry in a position to recover from the injury it had already sustained. However, the USITC's injury analysis suggested that the industry had suffered progressively severe injury as a result of imports during both 1997 and interim 1998, and the plurality did not explain why injury would not continue to mount if imports continued at 1998 levels, or how, if the industry remained in its current state of injury, it could regain its competitiveness. The three other Commissioners examined the same evidence and concluded that the industry *would* sustain serious injury at 1998 import levels.[118] The President was entitled to conclude that the views of those three Commissioners were correct.

116. There is no requirement under the Safeguards Agreement or Article XIX of the *GATT 1994* for a competent authority to recommend a remedy, and there is therefore no legal basis to require a Member to adopt that recommendation. Under Article 5.1 of the Safeguards Agreement, the authority to select and impose a remedy is vested in the Member. Creating a rule that would require a Member in all cases to impose a measure that is less than or equal to the competent authority's recommended remedy could lead Members to revoke their competent authorities' mandate to recommend remedies, thereby denying Members the benefits of their considered opinions.

117. Finally, if the competent authorities' views are to be regarded as definitive for purposes of assessing the degree of remedy required in any particular case, this would mean that application of the competent authorities' recommendation would be presumptively consistent with Article 5.1. That could result in Members applying safeguard measures that are inadequate or excessive.

Basis for the U.S. Safeguard Measure

1. Introductory Comments

118. Before addressing the factual basis and reasoning supporting the U.S. safeguard measure, the United States offers two preliminary comments. First, while the United States is pleased to

[118] USITC Report at I-40, I-49.

answer the Panel's question, we wish to reiterate that the burden is on New Zealand and Australia to make a *prima facie* case that the U.S. safeguard measure fails to comply with the requirements of Article 5.1, not on the United States to prove that the measure *does* comply. Because Australia and New Zealand have failed to present a *prima facie* case, the United States is under no obligation to provide evidence and reasoning in support of the measure's consistency with Article 5.1.

119. Second, in evaluating the consistency of the measure with the Safeguards Agreement and Article XIX, the Panel should reject New Zealand's and Australia's pleas to interpret the relevant terms and provisions "narrowly" or "strictly". Their argument, which is based on the purportedly "exceptional" nature of safeguards remedies, ignores the Appellate Body's admonition in *Hormones* (at ¶ 104) that characterizing a treaty provision as an exception:

> does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[119]

120. In fact, the Appellate Body has not described Article XIX as an "exception." Rather, it is a right that Members may invoke in exceptional circumstances. When Members have satisfied the conditions necessary for the application of safeguard measures, an excessively strict or narrow reading of Article 5.1 would risk rendering those measures ineffective, thus undermining the operation of Article XIX and the Safeguards Agreement.

2. Discussion of the U.S. Safeguard Measure

121. Before considering the safeguard measure itself, it is useful to recall the various remedy recommendations that the USITC forwarded to the President. First, a plurality of the Commissioners recommended a four-year tariff-rate quota with a 20 percent *ad valorem* duty on imports over 78 million pounds in the first year (approximately 1998 levels), 17.5 percent *ad valorem* on imports over 81.5 million pounds in the second year, and 15 percent and 10 percent *ad valorem* in the third and fourth years, respectively, on imports above the second-year levels.[120]

122. The plurality believed that its remedy would increase industry revenues in the first year and that this degree of import relief, in combination with adjustment assistance, would give the

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[119] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 104.

[120] USITC Report at I-29.

industry time to improve its competitiveness.[121] The plurality did not explain how maintaining lamb meat imports at record levels would generate higher revenues for the domestic industry.

123. The remaining three Commissioners recommended two different safeguard measures to address the threat of serious injury. Two Commissioners recommended that the President increase the rate of duty on *all* lamb meat imports for four years to 22 percent *ad valorem* in the first year, 20 percent *ad valorem* in the second year, 15 percent *ad valorem* in the third year, and 10 percent *ad valorem* in the fourth year.[122]

124. These Commissioners identified depressed domestic prices for lamb meat as the principal threat posed by the surge in imports and concluded that raising prices from then-current levels needed to be a "key focus" of an appropriate remedy. In the view of these Commissioners, "the industry would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur."

125. The two Commissioners estimated that under their proposed remedy prices would rise by approximately 17 percent in the first year of relief, while import levels would fall to a level between 1997 and 1998 imports. They expected that their remedy would allow the domestic industry to increase production due to the higher prices and to supply more lamb meat at a given price due to efficiency gains. They also expected that the remedy would result in long-term price stability and contribute to stable (if not increasing) demand.

126. The sixth Commissioner recommended quotas over four years that, in his view, would help restore industry profitability by restricting imports to their pre-surge levels.[123] He proposed an initial quota at 52 million pounds (the average level of imports in 1995-1997), with increases to 56, 61 and 70 million pounds in the second through fourth years of relief, respectively.[124] In the view of this Commissioner, the plurality's recommended remedy "would have virtually no discernable impact on the domestic industry over the four years" because it would only hold imports to 1998 levels for one year, and then allow imports to rise in line with projected increases.[125] In this Commissioner's view, the tariff remedy proposed by the two other Commissioners provided less relief than was necessary to facilitate the industry's adjustment.

127. As the foregoing demonstrates, the six USITC Commissioners all examined the same record of investigation and yet proposed three widely different remedy recommendations. The

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[121] USITC Report at I-36.

[122] USITC Report at I-39.

[123] USITC Report at I-48.

[124] USITC Report at I-47.

[125] USITC Report at I-49.

plurality recommended a tariff-rate quota. Two Commissioners recommended a straight tariff. One recommended a quantitative restriction. The various tariff and quota levels proposed as part of these recommendations differed considerably. In fact, the sole common denominators of the three proposals was import relief of four years duration and domestic adjustment assistance.

128. Thus, while each of the three remedy recommendations was aimed at achieving the same result (preventing serious injury and facilitating adjustment), the Commissioners differed on the minimum steps necessary to accomplish that result. This difference of opinion illustrates the point that decisions regarding the application of safeguard measures cannot be reduced to mathematical formulas, but rather are based on a mix of analysis, judgment, predictions, and policy preferences.

129. There are likely to be a wide range of reasonable remedy options from which a Member may choose in any given case. The remedy that the Member ultimately applies will reflect its views on a long list of considerations, including the nature of the injury the industry has sustained, which aspects of that injury the Member considers most important to address, predictions regarding the likely effect of particular forms, periods, and levels of relief, how various remedies will interact with any domestic relief under contemplation, factors affecting the industry's near-term prospects, trends in macroeconomic factors, the effects of differing measures on consuming industries, and so forth.

130. The safeguard measure that the United States ultimately applied to lamb meat imports is the product of a decision-making process of this kind. It can perhaps best be seen in perspective as falling within the range of views expressed by the six USITC Commissioners.

131. In form, the safeguard measure is most similar to the plurality recommendation in that it employs a tariff-rate quota and sets the in-quota amount at roughly 1998 import levels. However, the measure differs from the plurality recommendation in two respects.

132. First, the measure has a duration of three years, rather than four. In this respect, the measure is plainly less restrictive than the plurality recommendation.

133. Second, the measure includes an in-quota tariff while the plurality recommendation does not. All six USITC Commissioners had identified low prices as one of the principal reasons for the U.S. industry's poor financial health.[126] In particular, the USITC found that the industry's financial performance had worsened largely due to falling prices[127] and that, as a result, firms in the industry had experienced difficulty in generating adequate capital to finance modernization of

[126] USITC Report at I-23-24.

[127] USITC Report at I-20.

their domestic plants and equipment.[128] The plurality recommendation was designed to cap first year imports at 1998 levels, with increases over the next three years. In the plurality's view, the import cap would generate higher revenues for the domestic industry. But the plurality did not explain how that could be the case given that the industry had experienced threat of serious injury at 1998 import levels.

134. The safeguard measure seeks this same result -- revenue enhancement -- but in a way more plausibly calculated to achieve it. In particular, the measure increases duty rates on the in-quota amount with the object of generating a modest near-term price increase.[129] The measure is thus structured to provide limited relief from low prices, thereby making it possible for the industry to return to profitability. That objective is consistent both with preventing serious injury and with facilitating the industry's adjustment to import competition.

135. The high out-of-quota tariff component of the TRQ makes it likely that imports will not exceed their 1998 level (the highest import level ever) in the first year of relief.[130] The USITC concluded that increased lamb meat imports had directly captured market share from the domestic producers and that those imports were likely to have a negative impact on the industry's shipments, prices, and financial performance.[131] Three of the six Commissioners found that the U.S. industry would suffer serious injury if imports and prices remained at 1998 levels, even if there were no further price declines.[132] The overall effect of the safeguard measure is expected to be a slight reduction in imports from 1998 levels, with import levels increasing in years two and three as the in-quota amount expands.

136. The United States accompanied the safeguard measure with a substantial program of federal financial and regulatory assistance intended to facilitate the U.S. industry's adjustment by providing up to $100 million to assist with market promotion; product and production improvements; basic sheep research; a scrapie eradication program; and a lamb surplus removal program. Half of the $100 million is being made available to the industry in the first year.

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[128] USITC Report at I-21.

[129] *See* United States' First Written Submission at ¶ 217.

[130] Commissioners Miller and Hillman believed that the domestic industry "would experience serious injury caused by imports if import levels and prices continue at now-existing levels, even if no further price declines occur." USITC Report at I-40. Commission Koplan found, similarly, that a remedy set at existing import levels "would not stave off the threatened serious injury, much less provide the industry with the opportunity to make a positive adjustment to prepare for the import competition." *Id.* at I-49.

[131] USITC Report at I-24.

[132] USITC Report at I-40, I-49.

137. In summary, the U.S. safeguard measure is commensurate with the goals of preventing the threat of serious injury facilitating the industry's adjustment in this case. In its form and scope, the measure is similar to the remedy proposed by the USITC plurality except that it corrects for the plurality remedy's failure to address low prices in the near term. It addresses the high volume of imports and low prices that the USITC identified as responsible for the threat of serious injury to the U.S. lamb meat industry.

138. The measure avoids the high across-the-board tariff levels that two Commissioners proposed and the possibility that the price increases they would have generated could have significantly depressed domestic consumption. Moreover, as noted above, those Commissioners estimated that the tariffs they proposed would roll import levels back to between 1997 and 1998 volumes. By contrast, the U.S. safeguard measure was expected to generate a more modest import reduction.[133] In addition, the safeguard measure eschews the substantial reductions in import quantities that the sixth Commissioner proposed.

139. The safeguard measure is fully degressive, with tariff levels falling and quota levels increasing in the second and third years. The remedy has a duration of three years, a year shorter than proposed in each of the three USITC recommendations. Given its relatively short duration, the degree of trade restriction embodied in the measure is no more than that minimally necessary to restore a modicum of profitability to at least some producers during that period.

Question 18.

> **In *Korea–Dairy*, the Appellate Body stated that Article 5.1 does not require a Member to explain at the time of the determination why the safeguard measure chosen was necessary unless that measure is imposed in the form of a *quantitative restriction* that reduces imports below the last representative three-year average level.**
>
> **(a) What is the implication of this ruling for the case of the imposition of a tariff rate quota?**

Answer:

140. The implication of the Appellate Body's ruling is that there is no need to provide advance justification for a tariff-rate quota (TRQ), and no need to justify this TRQ in particular.

141. In *Korea–Dairy* (at ¶ 100), the Appellate Body rejected the Panel's broad finding that Members that apply safeguard measures are required to explain in their recommendations or

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[133] *See* United States' First Written Submission at ¶ 219.

determinations how they considered the facts before them and why they concluded that the measure was necessary to remedy serious injury and facilitate adjustment. The Appellate Body found (at ¶ 99) that Article 5.1 imposes a justification requirement *only* for safeguard measures that take the form of quantitative restrictions that reduce the quantity of imports below the average of imports in the last three representative years.

142. TRQs are a type of tariff measure in which the tariff is applied at different rates based on import levels.[134] TRQs are not "quantitative restrictions" as that term is understood in GATT practice, which has distinguished between the two. A primary example of this difference can be seen in the tariffication provisions of the WTO *Agreement on Agriculture*.[135] One of the main points of that agreement was to require the conversion of quantitative restrictions to TRQs and to distinguish between them in terms of WTO obligations. Similarly, when the drafters of *GATT* Article XIII (which governs the administration of quantitative restrictions) sought to apply its provisions not just to quantitative restrictions but to TRQs as well, they felt constrained to say so explicitly in the final paragraph of that article.[136] Because TRQs and quantitative restrictions are understood in GATT practice to be different types of measures, the obligation in Article 5.1 to justify quantitative restrictions that reduce imports below the average of imports in the last three representative years does not apply to TRQs.

143. In any event, even if there *were* such an obligation for TRQs, there would be no need to justify the TRQ applied in this case, because the in-quota amount of the tariff is set at 31,851,151 kilograms of imports in the first year of the TRQ, thus substantially exceeding the 1995-1997 average (approximately 21,387,924 kilograms),[137] and in-quota levels in the second and third remedy years are even higher. Moreover, if the 1997 surge year is excluded as unrepresentative, the average in the last three representative years (1994-1996) would be only 18,701,821 kilograms. The Appellate Body's ruling in *Korea–Dairy* (at ¶ 99) should therefore be conclusive on this point: "a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available.'"

(b) How does the Appellate Body's ruling in respect of Article 5.1 relate to (i) Article 3.1 which requires the publication of a report setting out "findings

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[134] The United States does not understand Australia or New Zealand to be arguing that Article 5.1, second sentence, applies in this case.

[135] *See* WTO Agreement on Agriculture, Art. 4.2 & n.1.

[136] In *Korea–Dairy*, the Appellate Body noted (at ¶ 96) that the obligation to ensure that a measure is "commensurate" applies "whether it takes the form of a quantitative restriction, a tariff *or* a tariff rate quota." (emphasis added). This is a further indication that the Appellate Body distinguishes between quantitative restrictions and TRQs.

[137] *See* USITC Report at II-19.

and reasoned conclusions reached on all pertinent issues of fact and law", including "whether the application of a measure would be in the public interest"; (ii) Article 7.2 which requires an investigation and determination *by the competent authorities* that a measure continues to be necessary and that the industry is adjusting, before that measure can be extended; and (iii) Article 12.2 which stipulates notification to the WTO Committee on Safeguards of the safeguard measure to be applied?

Answer:

144. Article 5.1 is the only provision of the Safeguards Agreement that requires a Member to provide written justification for the particular safeguard measure it applies, and then only for a certain class of quantitative restrictions not at issue here. Nothing in Articles 3.1, 7.2, or 12.2 conflicts with the Appellate Body's ruling that no additional justifications are required.

(i) Article 3.1

145. New Zealand and Australia have suggested that Article 3.1 requires competent authorities to justify, in the reports they are required to publish under that article, the ultimate safeguard measure that a Member chooses to apply. The subject matter of the reports referred to in Article 3.1 are the findings and conclusions the competent authorities reach based on the investigation they conduct pursuant to that article.

146. The first sentence of Article 3.1 makes plain that a Member may apply safeguard measures only *after* the Member's competent authorities have concluded their investigation:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member . . .

147. Since the investigation must conclude before a Member applies a safeguard measure, the competent authorities would not be in a position to know – much less justify – the safeguard measure that the Member ultimately decides to apply. Equally, the Member would not be in a position to decide what safeguard measure to apply (if any) until the competent authorities have finished their investigation and presented their report setting forth their basis for finding injury or threat thereof.[138] In addition, the competent authorities may not be in a position to know when they conclude their investigation what type of an assistance package the Member will be able to provide to the domestic industry, and the nature of the assistance package will likely affect the

[138] In this context, it should be noted that the Safeguards Agreement draws a distinction between "Members" (who apply safeguard measures) and competent authorities who conduct investigations. *See, e.g.*, references in Articles 2.1, 3.1, and 5.1.

Member's decision on an appropriate measure. Accordingly, Art 3.1 does not – and could not – call on competent authorities to justify in the reports on their investigations the measures that Members ultimately decide to adopt.

148. Article 3.1 establishes the procedural conditions that a Member must meet before applying a safeguard measure. The Member's competent authorities must conduct an "investigation" that meets certain specified transparency and due process standards (public notice, hearings, procedures for submitting evidence and rebuttals, opportunity to speak for or against the application of safeguard measure, and so forth). By its plain terms, the subject matter of Article 3.1 is the procedural conditions necessary to justify the application of a safeguard measure, rather than the nature of the measure itself.

149. The subject matter of the competent authority's investigation is whether the conditions for the application of safeguard measures, as described in Article 2.1 and elaborated on in Article 4.2(a), exist. Article 2.1 requires Members to have "determined" that certain conditions are present before applying safeguard measures. Article 4.2(a) makes clear that "the investigation" the competent authorities are required to conduct is focused on the question of whether those conditions exist:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate . . . .

150. Thus, the context for Article 3.1 make clear that the investigation referenced in that article is not the nature of the safeguard measure that the Member ultimately adopts, but the procedural preconditions for applying a safeguard measure in the first place. If the competent authorities meet the substantive and procedural conditions specified in Articles 2.1, 3.1, and 4, no further justification for applying a safeguard measure is required.

151. Article 3.1 states that the investigation by the competent authorities "shall include . . . public hearings or other appropriate means in which importers . . . could present evidence and their views, including . . . their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest." This requirement does not mean that the competent authorities must justify in their report the eventual measure that the Member applies. Article 3.1, second sentence, plainly refers to views regarding the appropriateness of applying "*a* safeguard measure" (emphasis added), rather than "*the*" safeguard measure.

152. Questions regarding whether the "public interest" would be served by the application of a safeguard measure are simply another facet of the competent authority's investigation concerning whether the Member would be justified in applying a safeguard measure of some kind. Article 3.1, second sentence, contemplates that the competent authorities will hear views regarding

whether applying a safeguard measure in the particular circumstances would be good public policy. It does not, and could not, require the competent authorities to hear views regarding the particular safeguard measure the Member decides to apply after the competent authorities conclude their investigation.

153. The "issues of fact and law" referenced in Article 3.1 are those that arise in the course of the competent authority's investigation. As demonstrated above, "the investigation" concerns the question of whether increased imports have caused or are threatening to cause serious injury to a domestic industry. The investigation called for under Article 3.1 need not address the question of what particular safeguard measure the Member should apply[139] and, as demonstrated above, the competent authority is not in a position to examine the measure the Member actually decides to adopt. Thus, the reasons for the Member's ultimate safeguard measure do not figure among the "pertinent issues of fact and law" that the competent authorities must include in their reports under Article 3.1. In any event, considerations of "public interest" are questions of policy, not issues of law or fact.

(ii) **Article 7.2**

154. Article 7.2, which establishes conditions for extending safeguard measures, does not require Members to justify their safeguard measures. Article 7.1 establishes as a general rule that the period of a safeguard measure shall not exceed four years. If a Member wishes to extend a measure beyond that period of time, Article 7.2 imposes an additional obligation for the competent authority to reexamine the situation of the domestic industry. Even if Article 7.2 were interpreted to give rise to an obligation to "justify" the *extension* of a safeguard measure, a question that we are not addressing here, it does not create an obligation to justify the measure itself.

155. When a competent authority determines whether a basis exists to extend a measure under Article 7.2, it is in essence predicting the effect on the domestic industry if the measure were revoked. To make this determination, it is not necessary for the competent authority to know what the Member's reasons were four years earlier for choosing the particular measure it did. Rather, it simply examines the remedy that is already in place.

(iii) **Article 12.2**

156. Similarly, nothing in Article 12.2 suggests that Members must justify their safeguard measures. Article 12.2 requires Members to provide the Committee with "all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased

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[139] In this respect, the USITC practice of soliciting public views on an appropriate remedy goes beyond what Article 3.1 requires.

imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization." The types of information listed in Article 12.2 are all factual in nature, and do not require legal or economic judgments or conclusions of the type that would be needed to justify a safeguard measure under Article 5.1.

157. Given the list of examples, the "pertinent information" called for in Article 12.2 is of a type that would inform the Committee of particular *facts* arising either out of the competent authority's investigation (product, evidence of serious injury) or the decision to apply a safeguard measure (form of the measure, its duration, and so forth). A "justification" by contrast would not be a factual description, but rather a kind of argumentation. Article 12.2 specifically requires Members to provide "evidence" of serious injury or threat thereof, but does not mention "evidence" of compliance with Article 5.1. This suggests that the drafters did not view such evidence as "pertinent information" and adds to the conclusion that Article 12.2 does not impose a justification requirement.

(c) In the light of the transparency and notification requirements under the Safeguards Agreement which at a minimum apply to the investigation, how does the United States substantiate its apparent view that the Safeguards Agreement effectively contains no transparency and explanation requirements concerning the application of Article 5.1? How in your view should the burden of proof be allocated under Article 5.1?

Answer:

158. The United States disagrees with the premise of the panel's first question. The Safeguards Agreement does contain transparency and explanation requirements concerning the application of Article 5.1, in that Article 12.2 requires that a Member notifying a safeguard measure provide a "precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization."

159. This transparency requirement marks an important advance from the situation that pertained in the past. The notification requirements in Article XIX of the *GATT 1947* were minimal, amounting to little more than the need to "give notice" of the intention to take action under the article and to give other parties an opportunity to consult. There were, of course, no notification requirements whatsoever for "grey-area" measures. The Safeguards Agreement addresses this situation by establishing a minimum level of required transparency that applies to *all* safeguard measures.

160. Moreover, Article 5.1, second sentence, contains a justification requirement for certain safeguard measures. Article 5.2(b) contains a similar justification requirement for "selective" allocation of quantitative restrictions. The fact that the drafters of the Safeguards Agreement felt

a need to include these particularized justification requirements in Article 5 suggests that they did not consider that any other provision of the Safeguards Agreement imposed a general justification requirement.

161. Finally, given the requirement in Article 3 to publish a report of the competent authority's investigation (which must include findings and reasoned conclusions on the injury factors contained in Article 4.2(c)) and the requirement in Article 12.2 to provide a precise description of the safeguard measure, there is no compelling need for Members also to provide written justifications of their safeguard measures. The question of whether a Member has applied a safeguard measure that is commensurate with the serious injury or threat of serious injury that domestic producers have sustained should be discernible by examining the measure in light of the findings and determinations set out in the competent authority's report.

162. Regarding the Panel's second question, it is well established that the complainant has the burden of presenting a *prima facie* case of noncompliance with the terms of a covered agreement.[140] Therefore, in this case, the burden is on Australia and New Zealand to demonstrate that the U.S. safeguard measure was *not* applied "only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment." The United States discussed its view of an appropriate analytical framework at ¶ 210 of its first written submission. If Australia and New Zealand were to meet their burden, the United States would then be obliged to bring evidence and argument to rebut their *prima facie* case. In no event, however, would the United States be obliged to "justify" the U.S. measure. New Zealand and Australia have not begun to meet their burden on this issue, which is not surprising given the restrained nature of the measure the United States put in place.

163. Australia's and New Zealand's argument that the United States was required to "justify" its safeguard measure is in essence an improper attempt to shift the burden of proof under Article 5.1 to the United States. Their approach in this regard is reminiscent of the Panel's conclusion in *Hormones* that the *SPS Agreement* allocated the "evidentiary burden" to the Member imposing an SPS measure. The Appellate Body (at ¶ 99 *et seq.*) rejected the Panel's conclusion on the grounds that:

> [i]t does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent

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[140] *See* Report of the Appellate Body in *Wool Shirts* (at 16) (stating that it "was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption."). *See also id.* at 17 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the presumption that the mere assertion of a claim might amount to proof. . . .")

> necessary to protect human, animal or plant life or health . . .", and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 [of the SPS Agreement] does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. . . .[141]

164. Like Article 5.8 of the SPS Agreement, Article 5.1 of the Safeguards Agreement "does not purport to address burden of proof problems; it does not deal with a dispute settlement situation." Therefore, the United States submits that the Appellate Body's ruling with respect to Article 5.8 of the SPS Agreement is equally valid with respect to Article 5.1 of the Safeguards Agreement. As the Appellate Body stated in *Wool Shirts* (at 19), "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."

Question 19.

> **In its first submission, in paragraphs 210 *et seq.* the United States proposes a four-step test for examining compliance with the requirements of Article 5.1 and applies the first three steps thereof to the lamb safeguard measure. Could the United States complete the application of its test with respect to item (iv), i.e., an assessment of "whether the measure, in its totality, is more restrictive than required both to prevent serious injury from occurring and to assist the industry in adjusting to import competition"? Where in its submission or any published source can information be found on that item, including economic modeling, if any?**

Answer:

165. Please see response to Question 17. The United States would add two additional points on the specific questions posed here.

166. While Article 5.1 plainly prohibits Members from applying measures that are manifestly excessive, it cannot be interpreted as imposing a requirement to identify and apply a hypothetically perfect import remedy. Because it is an uncertain enterprise, in which Members are called upon to make predictions about the economic effect of a measure that has not yet been proposed, the application of a safeguard measure simply is not capable of that degree of fine tuning. This point was recognized by the Committee that reviewed the United States' application of an Article XIX measure in the case on *Hatters' Fur*:

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[141] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at ¶ 102.

> the Working Party considered that it is impossible to determine in advance with any degree of precision the level of import duty necessary to enable the United States industry to compete with overseas suppliers in the current competitive conditions of the United States market, and that it would be desirable that the position be reviewed by the United States from time to time in the light of experience of the actual effect of the higher import duties . . . .[142]

167. The Working Party's observation on the impossibility of predicting the future with any degree of precision raises another factor that militates against an overly rigid approach to interpreting Article 5.1: Article 7.4 of the Safeguards Agreement requires Members progressively to liberalize their safeguard measures over time and, by corollary, not to increase them – even if events after the measures are imposed indicate that they are failing to prevent or remedy serious injury and facilitate adjustment. New Zealand and Australia have urged a reading of Article 5.1 that would require Members to apply theoretically ideal safeguard measures, with import restraints set at levels just shy of the line of ineffectiveness. That reading would risk frustrating the purpose of the Safeguards Agreement and Article XIX of *GATT 1994* by withholding the latitude that Members must have to ensure that the measures they apply have a real prospect of success.

168. Finally, the United States notes the Panel's reference in its question to the economic model that the United States used in attempting to predict the effects of its safeguard measure. Article 4 of the Safeguards Agreement establishes that an injury finding requires the examination of a number of factors, none of which is dispositive, and all of which may respond differently to a particular type of safeguard measure. Consequently, no amount of modeling can establish the necessity or lack thereof of any particular measure. While the United States did use a model to test the possible effects of its measure, nothing in Article 5.1 required modeling or makes the results of such models a sound basis for judging a measure's compatibility with that article.

169. Given that the application of safeguard measures is fundamentally a predictive -- and thus necessarily speculative and imprecise -- exercise, Article 5.1 cannot be read to require Members to achieve scientific exactitude in calibrating those measures. No economic model is infallible – there are simply too many economic variables (changes in exchange rates, consumer tastes, macroeconomic or fiscal conditions, technology) for a model to serve as anything other than an imperfect tool in deciding how a particular measure should work if all other variables are held constant.

170. In sum, safeguard measures cannot be applied with scientific certainty, and Article 5.1 cannot be fairly read to require it. Rather, as the United States stated in its first written

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[142] *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/106, report adopted on 22 October 1951, ¶ 35.

submission, the proper inquiry under Article 5.1 is whether there is an evident mismatch between the safeguard measure, taken in its totality, and the finding and determinations set out in the competent authority's report. The burden of demonstrating a failure to comply with Article 5.1 is on New Zealand and Australia. To-date, they have failed to meet their burden.

Question 20.

Assuming that the application of a safeguard measure other than a quantitative restriction has to be justified under Article 5 if it is challenged as exceeding the extent necessary to prevent threat of serious injury and to facilitate adjustment, (i) should such justification be based on information contained in the published report, (ii) would it suffice to show that the justification presented is based on information available to the competent authority at the time of the determination, or (iii) could a justification be based on information submitted *ex post* during a WTO dispute?

Answer:

171. The United States believes that it will be possible to discern in most (if not all) cases whether there is a substantial mismatch between the safeguard measure applied and the relevant findings and determinations in the competent authority's report, and therefore whether the measure is "commensurate with the goals of preventing or remedying serious injury and facilitating adjustment."[143] However, it is up to the complainant to establish a *prima facie* case that such a mismatch exists, at which time the defendant will be obliged to come forward with evidence and argument sufficient to rebut the *prima facie* case.

Question 21.

Is it the US interpretation of Article 5 that:

(a) this article allows Members to freely choose between different types of safeguard measures (e.g., tariff surcharges, tariff rate quotas, quantitative restrictions)?

Answer:

172. As a preliminary matter, the United States notes that New Zealand and Australia have not questioned the United States' selection of a TRQ, and indeed have suggested that they approve of the USITC plurality's recommended safeguard measure, which also took the form of a TRQ.

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[143] *Korea–Dairy*, Report of the Appellate Body at ¶ 96.

173. Turning to the Panel's question, the United States considers that a Member is permitted to choose between tariff surcharges, tariff rate quotas, and quantitative restrictions provided that the selected measure is applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." This conclusion is supported by the second sentence of Article 5.1, which states that "if a quantitative restriction is used," thereby demonstrating that a Member has discretion in choosing among measures.

174. Article 6 provides further support for this conclusion, since it states that provisional measures "should take the form of tariff increases . . . ." Article 5, concerning definitive safeguard measures, contains no parallel provision. Plainly, the drafters of the Safeguards Agreement knew how to limit the universe of permissible measures when they wanted to do so. The fact that they did not do so in Article 5 reflects that they did not intend to impose such a limitation as to definitive measures.

175. It is worth observing that early in the negotiation of the Safeguards Agreement some parties argued that safeguard measures should be limited to tariff increases.[144] The first "chairman's draft" reflected a compromise view, stating that safeguard measures "should preferably take the form of tariff increases, but may also take the form of quantitative restrictions."[145] In the final text, the preference for tariff increases was deleted, apparently in favor of the admonition in the third sentence of Article 5.1 that Members should choose measures "most suitable" for the achievement of the objectives in the remainder of the paragraph.[146] The outcome of the negotiations on this point reflected Member practice in choosing among a wide variety of safeguard measures.[147]

176. Finally, in *Korea–Dairy*, the Appellate Body stated (at ¶ 96) that "[w]hether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary . . . ." This suggests at a minimum that the Appellate Body views these three types of measures as permissible under Article 5.

(b) once a measure other than a quantitative restriction has been chosen, if challenged by another Member, the Member imposing the safeguard measure has to show that, in its totality, e.g., the size of the tariff rate quota,

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[144] *See, e.g., Elements for a Comprehensive Understanding of Safeguards, Communication from Brazil*, MTN.GNG/NG9/W/3, ¶ 6 (25 May 1987).

[145] MTN.GNG/NG9/W/25 at 4.

[146] *Compare Negotiating Group on Safeguards, Draft Text of an Agreement*, MTN.GNG/NG9/W/25/Rev. 3 (31 October 1990), ¶ 6 (containing the preference for tariff increases but not referencing the "most suitable" measures) *with* Safeguards Agreement, Art. 5.1.

[147] *See Guide to GATT Law and Practice* (GATT Analytical Index), vol. I, at 522-23 (discussing the wide variety of safeguard measures notified under Article XIX).

its duration, the in-quota and out-of-quota tariffs, etc., the measure is no more restrictive than required to achieve the dual objectives of Article 5.1?

Answer:

177. The burden is on the complaining party to demonstrate that the measure was *not* applied "only to the extent necessary to prevent or remedy the serious injury and to facilitate adjustment." If the complainant establishes a *prima facie* case that the measure was not applied "only to the extent necessary", the defendant will then be obliged to provide facts and evidence sufficient to rebut the *prima facie* case.

178. As the Appellate Body stated in *Wool Shirts* (at 16), "it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the *ATC*. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the argument." To paraphrase the Appellate Body (*id.* at 19-20), the Safeguards Agreement is a fundamental part of the rights and obligations of WTO Members. Consequently, a party claiming a violation of a provision of the Safeguards Agreement must assert and prove its claim.

Question 22.

Article 5.1 provides that "a Member shall apply safeguard measures only to the extent necessary to prevent . . . serious injury and to facilitate adjustment". In order to fulfill that standard, does a Member imposing a safeguard measure have to apply, e.g., (i) an "effective" measure, (ii) the least-trade restrictive measure, (iii) a "proportionate" measure, or something else?

Answer:

179. In the view of the United States, a Member applying a safeguard measure is not obliged to apply an "effective" measure. While a Member presumably will seek to do so, Article 5.1 imposes no such legal obligation. A Member may choose to apply a measure that may not be fully effective if, for example, the Member concludes that the public interest, or broader economic concerns, supports such an approach. In addition, since a Member may elect to apply both a safeguard measure and domestic adjustment measures, it is possible that the import relief may not be fully "effective" on its own.

180. As the United States explained in its first written submission (at ¶¶ 182-191), a Member is not obliged to apply the single "least trade restrictive measure".

181. Finally, in *Korea–Dairy*, the Appellate Body stated that a safeguard measure should be "commensurate" (or, more properly for purposes of this proceeding, not "incommensurate") with the goals of preventing or remedying serious injury and facilitating adjustment. That appears to be a somewhat more appropriate way to describe the standard that Article 5.1, first sentence imposes than the concept of "proportionality." The latter might be understood as suggesting that remedy decisions can be reduced to simple mathematical exercises, while the former better captures the complexities and judgments inherent in selecting a safeguard measure.

Is the exclusion of Canada, Mexico and Israel from the safeguard measure consistent with the Safeguards Agreement and GATT 1994?

Question 23.

> **Is it factually correct that the United States included imports from NAFTA countries in its analysis of threat of serious injury and causation, and yet excluded those imports from the application of the measure? If not, please explain. Please indicate whether the approach taken by the United States in this case is consistent with the "parallelism principle" as endorsed by the Appellate Body in *Argentina - Footwear,* and if so, please indicate whether this is because (i) NAFTA Article 802 would exclude imports from other NAFTA countries *de jure* from the injury and causation investigation; or (ii) because the imports from other NAFTA countries were negligible in this case; or for some other reason. Was the decision to exclude imports from certain sources based on a purely static analysis of import shares, or did the USITC also take into account the potential increase of imports from sources of supply that were exempted from the application of the safeguard measure relative to imports from sources that were subject to the safeguard measure?**

Answer:

182. As a factual matter, the only lamb meat imports from Mexico during the investigatory period were 202,000 pounds in 1995, accounting for approximately 0.4 percent of total imports in that year. There were no imports from Mexico during the final three years of the investigatory period, and therefore no imports to include in the USITC's analysis of threat of serious injury and causation. Similarly, imports from Canada ranged from a low of approximately 0.005 percent of total imports (in 1993) to a high of approximately 0.3 percent of total imports (in 1997).

183. Thus, imports of lamb meat from Canada were negligible throughout the investigatory period. At no time during 1993-98 did imports from Mexico and Canada collectively exceed even one-half of one percent of total imports. Thus, as a practical matter Canadian and Mexican

imports did not figure into the USITC's analysis of the effect of increased imports – for the simple reason that they remained at negligible levels throughout.

184. The United States does not understand the Appellate Body to have established a broad requirement of "parallelism" given the fact-specific nature of the *Footwear* dispute. Nevertheless, the procedures contemplated by NAFTA Article 802, and employed by the United States in the case of its lamb meat safeguard, satisfy the purpose of the "parallelism" notion the *Footwear* Panel articulated. That idea is to ensure that when a Member attributes serious injury to increased imports originating in the territory of a country that is a party to a customs union (or FTA, in this case), those imports should be included in the safeguard measure the Member determines to apply. NAFTA Article 802, and U.S. law implementing that provision, provide for the inclusion of FTA imports in a U.S. safeguard measure in such cases.

185. In the case at issue, due to the fact that imports from Canada and Mexico were either zero or considerably less than one percent in each year investigated, the United States could not have acted inconsistently with any "parallelism" principle.

Request for information

Question 24.

Please provide the following documents:

(a) The confidential version of the USITC's determination (i.e., pages I-7 to I-27 of the USITC report).

(b) The following tables from Section II of the USITC's report: Tables 3, 4, 8, 9, 14, 16, 18, 21, and 38-43.

Please indicate what sort of procedures would be necessary in your view to protect the business confidential information contained in the above-requested documents.

Answer:

186. The United States proposes that the panel accept the requested information in indexed form. In brief, the United States proposes to assign an index of 100.0 to the first number in a series and express each subsequent number as a ratio to the first, multiplied by 100. While such an approach is not available in all proceedings, the USITC investigative staff has concluded that in this case almost all of the requested information can be so converted and provided to the panel without risking disclosing any firm's confidential information. Accordingly, by following this method, the United States can provide the panel the substance of the data requested in a form that

need not be subject to special confidentiality procedures. The indexed numbers would permit the panel to recognize trends and calculate percent changes between any two periods, consecutive or non-consecutive. This procedure has been applied to all data in the requested tables, and the results of that indexing accompany this submission. As to the requested information in the report, in most instances, confidential data are percentage changes based on data in the tables. The Panel can calculate these percentage changes from information obtained from the USITC's indexing of the tables.

187. This submission allows the Panel access to the requested data without requiring the competent authority, as required by Article 3.2 of the Safeguards Agreement, to seek consent for disclosure of the actual confidential data to the Panel. USITC investigative staff have expressed concern that making such requests will impede the USITC's ability to obtain updated confidential data as part of the agency's "mid-point review"of the safeguard action on lamb meat. Section 204 of the Trade Act of 1974, as amended, requires the USITC to monitor developments with respect to any safeguard action so long as it remains in effect.[148] Specifically, the USITC is to monitor the progress and efforts made by the domestic industry to make a positive adjustment to import competition under the safeguards action,[149] and, if the action remains in effect for more than three years, the USITC is to prepare a report on its findings.[150] The USITC is to submit its report to the President and the Congress no later than the date that is the mid-point of the initial period during which the action is in effect.[151]

188. USITC staff are beginning investigative work in connection with the "mid-point review" of the safeguard on lamb meat. They believe that asking companies who submitted information in confidence to the USITC during the original investigation to disclose that information in the Panel proceeding will have a chilling effect on the agency's ability to gather new information. This is particularly the case because disclosure in unindexed form of much of the data the panel requested would require consent from companies, including importers and foreign producers, who, in the original investigation, did not support the requested relief. Many were already reluctant to provide confidential business information. Consequently, there is reason to believe that the necessary consents might well not be forthcoming and, even if they were, would be liable to lead firms to resist making further disclosures to the USITC. In brief, the United States believes that submitting the requested information to the Panel in indexed form optimally

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[148] 19 U.S.C. § 2254(a)(1), attached hereto as U.S. Exhibit 40.

[149] 19 U.S.C. § 2254(a)(1).

[150] 19 U.S.C. § 2254(a)(2), attached hereto as U.S. Exhibit 40.

[151] 19 U.S.C. § 2254(a)(2).

satisfies the Panel's request while not compromising the competent authority's ability to conduct further investigative efforts.[152]

189. If the Panel believes that accepting the requested information in indexed form is not satisfactory, then the United States respectfully suggests that procedures similar to those that the Panel in the *Wheat Gluten* dispute proposed on February 24, 2000 would be most likely to enable the United States to obtain the necessary consent from the information submitters.[153]

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[152] The indexed information is attached hereto as U.S. Exhibit 41.

[153] *See Fax from Jasper Wauters, Rules Division, to Mr. J. J. Bouflet and Mr. D. Brinza,* dated February 24, 2000. The proposal suggested in pertinent part that:

> No more than two representatives of the United States would bring the requested information to a designated location at the premises of the WTO in Geneva on [date]. The Panel, two professional staff of the WTO Secretariat, and no more than two representatives of the European Communities would review the information exclusively *in camera*. No photocopies of the information would be permitted. The Panel, the two professional staff of the WTO Secretariat, and the representatives of the European Communities may take written summary notes of the information for the sole purpose of the Panel process. These individuals would be under an obligation not to disclose the information, or to allow it to be disclosed, to any person. Any such notes would be destroyed at the conclusion of the Panel. While the Panel would be under an obligation not to disclose the information in its report, it could make statements of conclusion drawn from such information.

UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF LAMB MEAT FROM NEW ZEALAND AND AUSTRALIA

U.S. REPLIES TO QUESTIONS FROM AUSTRALIA

June 22, 2000

Injury

Question 1. Does the USA rely in this dispute on any data designated as confidential in the public version of the USITC Report? If so, where does this occur? Could the USA please provide any such confidential data from the USITC Report on which it seeks to rely for justifying the measure and the USA's compliance with Safeguards Agreement and GATT 1994 Article XIX.

Reply

1. We believe that the public report of the USITC provided the detailed analysis and demonstration of the relevance of the factors examined that are required by Article 4.2(c). The "views" of the USITC Commissioners, which set out their findings and conclusions on all pertinent issues of fact and law, contain virtually no confidential data. The small amount of confidential data in their views relates to (1) data concerning the proportion of lamb meat imports that are fresh or chilled (certain Australian data were confidential);[1] (2) data relating to the percent of the value of packers' net sales accounted for by carcasses and percent accounted for by pelts and offal;[2] (3) support for the petition by firms other than those listed in the petition;[3] (4) the percentage by which packer production declined between 1993 and 1997 (but not the fact that production fell);[4] (5) the percentage amount by which the value of net sales of packers and breakers fell (but not the fact that the value of their net sales fell);[5] and (6) certain inventory data (which the USITC did not find particularly relevant because lamb meat is perishable).[6]

2. Thus, USITC Commissioners directly cited confidential data in the non-public version of their views in only six instances. In four of the instances, the first, second, fourth, and fifth, the data support findings and conclusions that are fully stated in the public version of the report. The data in the two remaining instances do not relate findings on which the USITC based its affirmative decision (the position of non-petitioner firms, and certain inventory data).

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[1] USITC Report at I-11.

[2] USITC Report at I-13.

[3] USITC Report at I-14.

[4] USITC Report at I-18.

[5] USITC Report at I-19.

[6] USITC Report at I-20.

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3. With respect to the provision of confidential information, please see the United States' response to the Panel's Question 24 to the United States.

Question 2. Does the USA agree that one of the essential requirements under the Safeguards Agreement for a Member to apply a safeguard measure is that its competent authority has made an affirmative finding in terms of SG Article 4 that increased imports are causing or are threatening to cause serious injury to the "domestic industry" specified in SG Article 4.1(c)?

Reply

4. Yes. The United States also wishes to call to Australia's attention its responses to the questions of the Panel.

Question 3. At paragraph 66 of its First Submission, the USA refers to "vertical integration of the industry". Could the USA please provide data on how many growers are feeders, and how many growers are both feeders and packers.

Reply

5. Approximately 20 percent of all growers and grower/feeders who responded to USITC questionnaires indicated they were both growers and feeders.

6. The USITC Report states that at least one grower owns both a feeder and a packer.[7] We also note that one holding company is a major domestic lamb packer that also owns both a major

[6] USITC Report at I-20.

[7] USITC Report at II-12.

feeder and a major breaker operation.[8] Some lamb producers retain title to their lambs in feedlots, by having them fed for a fee or in partnership with the feedlot owner.[9] The exact number is not known. Clearly, lamb producers have a direct interest in slaughter operations as estimates indicate that 70 to 80 percent of lambs slaughtered were previously fed in feed lots.[10]

Question 4. Could the USA please also provide the numbers of feeders, packers, packer/breakers, and breakers in the USA, including not only specialist packers and breakers of sheepmeat but also those that produce meat from other livestock species.

Reply

7.	**Number of Feeders:**	11[11]
8.	**Number of Packers:**	The exact number is not known. USDA data show that 9 plants accounted for 85% of the sheep and lambs slaughtered in 1997, while 571 plants were certified by USDA in 1997 to slaughter lamb and sheep.[12]
9.	**Number of Packer/Breakers:**	Four operators defined themselves as packer/breakers in response to USITC questionnaires.
10.	**Number of Breakers:**	Less than 10 major firms.[13]

[8] USITC Report at I-14.

[9] USITC Report at II-12.

[10] USITC Report at II-24.

[11] USITC Report at II-13.

[12] USITC Report at II-15, n. 57.

[13] USITC Report at II-15.

Measure to be applied "only to the extent necessary"

Question 5. Was there a further investigation or inquiry by whatever name carried out by the USA following the USITC reporting to the President in April 1999? If so, could the USA please provide details about it and any new information obtained. Could the USA please also provide copies of the documentation, if any, setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure.

Reply

11. After the USITC issued its affirmative determination that imports of lamb meat were threatening to cause serious injury to the U.S. industry, the United States considered whether to apply a safeguard measure and, if so, to what extent. As part of this process, the United States authorities conferred with interested parties, including on several occasions with representatives of Australia and the Australian lamb meat industry, to obtain their views on an appropriate remedy. Indeed, after the United States announced its measure, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the U.S. measure.[14]

12. Article 3.1 of the Safeguards Agreement requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. By its plain terms, Article 3.1 applies to the competent authority's investigation, not to the subsequent decision by a Member on whether to apply a safeguard measure and, if so, the nature of the measure. Neither Article 3.1 of the Safeguards Agreement nor any of its other provisions requires a Member to maintain or publish a record of its deliberations.

13. Australia's request for "documentation . . . setting out the findings and reasoned conclusions of the investigation or inquiry on WTO issues regarding the measure" appears to be a request for the United States to provide a justification of its measure. The Safeguards Agreement imposes no requirement of this kind. As a complainant in this dispute, Australia has the burden of proving its claim that the United States has applied a safeguard measure beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Australia cannot shift that burden to the United States.

[14] Attached hereto as U.S. Exhibit 42.

Question 6. Did the USA make a finding on the necessity of the extent of the measure under SG Article 5.1 before applying the measure? If so, could the USA please provide a copy of the decision and supporting documentation.

Reply

14. Please see response to question 5.

Question 7. What was the "economic model" referred to in paragraphs 216-224 of the USA's First Submission? Could the USA please provide details of the model used.

Reply

15. The United States provided details on the model in footnote 220 of the United States' first written submission.

Question 8. What aspect of this model did the USA use to ensure that the measure was applied "only to the extent necessary" in order to satisfy SG Article 5.1?

Reply

16. The United States used the model to try to predict the effects of various combinations of in-quota and out-of-quota tariffs. The United States explained the model's predictions in ¶¶ 217-219 of its first written submission.

"Shall endeavour to maintain a substantially equivalent level of concessions and other obligations"

Question 9. Can the USA confirm that, as set out in the last sentence of paragraph 35 of its Opening Statement on 25 May 2000, it considers that it met its SG Article 8.1 obligations by meeting with Australia twice and did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia.

Reply

17. Paragraph 35 of the United States' opening statement does not state that the United States "did not endeavour to maintain a substantially equivalent level of concessions and other obligations with Australia." It does, however, note that the United States consulted with Australia on two occasions, specifically, on 28 April and 14 July 1999.

18. Australia argues that Article 8.1 required the United States to offer Australia trade concessions in recompense for the trade effects of the U.S. safeguard measure. Article 8.1 imposes no such requirement, a fact that Australia itself appears have acknowledged outside this proceeding.

19. After Australia notified its safeguards regime to the Committee on Safeguards,[15] Canada asked whether the safeguard procedures that Australia had notified provided for adequate compensation under Article 8 and, if not, whether other Australian legislation made provision for compensation. Australia's response was:

> No. That would not be the responsibility of the [Australian competent authority]. There is no specific provision for this in Australian legislation. The issue of compensation or concessions would have to be addressed in each case and, *if appropriate*, the requisite action taken, which might conceptually involve new legislation. *Our understanding is that the issue of compensation or concessions, apart from the issue of the size and administration of quota and tariff quotas has been rare for safeguard action.*[16]

20. Australia's response to Canada indicates that, in Australia's view, a Member may choose to accommodate the interests of other Members through adjustments in the size and administration of quotas and TRQs, and that compensation under Article 8.1 will rarely be appropriate. Australia also appears to view this question as one for the importing Member to decide.

21. The United States has acted in this case in conformity with the approach Australia outlined in its response to Canada's question. Throughout the course of its deliberations on an

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[15] G/SG/N/1/AUS/2, circulated on 2 July 1998.

[16] *Notification of Laws and Regulations Under Article 12.6 of the Agreement, Replies from Australia to Questions Posed by Canada and the United States,* G/SG/Q1/AUS/3, at 2 (27 April 1999) (emphasis added).

appropriate remedy, the United States conferred with Australia on an appropriate safeguard measure. The high in-quota quantity included in the TRQ, the separate quota allocations for Australia and New Zealand, and the fact that the TRQ does not establish specific limits for fresh and frozen lamb meat products are all consistent with requests that Australia (and New Zealand) made to the United States as the measure was under consideration. Moreover, at Australia's and New Zealand's request, the United States promulgated a regulation to administer the TRQ through an export certificate system and agreed to delay the effective date of the measure to permit an additional 1.5 million tons of lamb meat to enter the United States outside the TRQ. As noted above in response to question 5, Australia's Deputy Prime Minister and Minister for Trade issued a press release crediting "Australia's intensive lobbying" for delaying and ultimately reducing the level of the U.S. measure.

LIST OF U.S. EXHIBITS

United States – Safeguards Measures on Imports of Lamb Meat from New Zealand and Australia

U.S. Exhibit	Description
20.	USITC Hearing Transcript at 164
21.	57 Stat. 833 (1943), E.A.S. 311 (effective January 30, 1943)
22.	Reciprocal Trade Agreements Act of 1934
23.	John Jackson, *World Trade and the Law of GATT* 553 (1969)
24.	Exec. Order No. 9832 of February 25, 1947
25.	*Extending Authority to Negotiate Trade Agreements, Hearings before the Committee on Finance, United States Senate*, H.R. 6556, at 128 (1948)
26.	United States Tariff Commission, *Hand-Blown Glassware*, Report to the President on Investigation No. 22 Under Section 7 of the Trade Agreements Extension Act of 1951, as amended, at 51-52 (1953)
27.	*Fresh Tomatoes and Bell Peppers*, Inv. No. TA-201-66, USITC Pub. 2985 (Aug. 1996), at I-9-10
28.	*Apple Juice*, Inv. No. TA-201-59, USITC Pub. 1861 (June 1986), at 5-10
29.	*Certain Canned Tuna Fish*, Inv. No. TA-201-53, USITC Pub. 1558 (Aug. 1984), at 5-7
30.	*Webster's Third New International Dictionary (Unabridged)* at 1810 (1981)
31.	*Webster's New Collegiate Dictionary* at 918 (1977)
32.	*Webster's Ninth New Collegiate Dictionary* at 838 (1985)
33.	*Webster's Third New International Dictionary (Unabridged)* at 355, 356, 1317 (1981); *New Shorter Oxford English Dictionary* (1993) at 355, 356.
34.	*Webster's Ninth New Collegiate Dictionary* at 217, 695 (1985)
35.	Testimony of Joseph Casper, transcript of injury hearing at 22
36.	Testimony of Harold Harper, transcript of injury hearing at 30
37.	19 U.S.C. 2252(b)(1)(B)

38. Petition For Relief From Imports of Lamb Meat Under Section 201of the Trade Act of 1974, dated September 30, 1998, at 4, 5

39. 19 C.F.R. § 206.14(b)(3)

40. 19 U.S.C. § 2254(a)(1), (2)

41. Indexed Tables

42. Media Release of 7 July 1999 by Deputy Prime Minister and Minister for Trade Tim Fischer.